# FLIPPING THE SCRIPT: *CONTRA PROFERENTEM* AND STANDARD FORM CONTRACTS

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*Virtually all modern contracts are standard forms. Although courts have long interpreted ambiguities in such agreements strictly against the drafter, they have struggled to explain why they do so. Under sustained academic fire, states are beginning to abandon the strict against-the-drafter doctrine. Recent cases have even refused to certify class actions on the grounds that a corporate defendant's nonnegotiated, unilaterally-dictated contract is ambiguous and thus cannot be construed without individualized extrinsic evidence. This Article claims that the rejection of the strict against-the-drafter rule stems from confusion about its normative foundation. Judges and commentators have offered three rationales for the doctrine: that it discourages ambiguity, corrects unfairness, and redistributes wealth. These theories share the goal of improving the quality and legibility of standard-form terms. But even if they succeed, the resulting gains are unclear. Most consumers ignore the fine print, and those who do not are boundedly rational and thus unable to value terms accurately. This Article contends that the doctrine is better understood as encouraging uniformity of meaning in mass-produced contracts. Firms cannot reap the benefits of standardization—institutional, informational, and agency savings—if homogeneous terms lack a single, overarching meaning. At the same time, firms have powerful incentives to use ambiguity strategically and retain confusing terms. The strict against-the-drafter rule counterbalances these enticements. In addition, it prevents the absurd consequences that would result if the meaning of identical terms could fluctuate with the particulars of each transaction.*

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## INTRODUCTION

A wave of recent class actions accused Ford of breaching a promise to install heavy-duty 1.42 inch radiators in nearly half a million F-150 trucks.[1] The plaintiffs alleged that they had received standard 1.02 inch radiators despite the fact that the sales memoranda for their option packages had touted an "upgraded radiator."[2] Ford's response seemed stunningly counterintuitive. Ford did not quarrel with plaintiffs' interpretation of the sales memoranda. Despite the fact that the memoranda were standard-form contracts offered on a take-it-or-leave-it basis—giving Ford complete dominion over their terms[3]—Ford took the position that they were so poorly drafted that they could plausibly have several meanings:

> The phrase upgraded radiator is really ambiguous. It's a possible interpretation that [the phrase upgraded radiator] could mean a different piece of equipment, or it could mean something else entirely . . . .
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> . . . .
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> . . . It could be interpreted by any number of people in any number of different ways. That's why I said ambiguous.[4]

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1. *See* Zeno v. Ford Motor Co., 238 F.R.D. 173, 175 (W.D. Pa. 2006); Roland v. Ford Motor Co. 655 S.E.2d 259, 260–61 (Ga. Ct. App. 2007); Murrin v. Ford Motor Co., 303 A.D.2d 475, 476 (N.Y. App. Div. 2003); Ford Motor Co. v. Ocanas, 138 S.W.3d 447, 450 (Tex. App. 2004); *Daily Briefing*, ATLANTA J. & CONST., Oct. 31, 2001, at D2, *available at* 2001 WLNR 3955704 (describing Ford's remedial measures); *Dallas & State Digest*, FT. WORTH STAR-TELEGRAM, Jan. 4, 2002, *available at* 2002 WLNR 1542204 (reporting on lawsuit brought on behalf of 80,000 Texans); *Suit Against Ford Now Class Action*, AKRON BEACON J., Apr. 16, 2002, at C9, *available at* 2002 WLNR 1785329 (noting that there are 450,000 class members).

2. *Zeno*, 238 F.R.D. at 184.

3. These types of agreements are sometimes called "contracts of adhesion." Edwin Patterson borrowed this phrase from French jurist Raymond Saileilles. *See* Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) [hereinafter Patterson, *Life Insurance*]; Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964) (describing a contract "in which a single will is exclusively predominant, acting as a unilateral will that dictates its law, no longer to an individual, but to an indeterminate collectivity" (quoting and translating RAYMOND SALEILLES, DE LA DÉCLARATION DE VOLONTÉ § 89, at 229–30 (1901))). It eventually caught on with courts. *See, e.g.*, Standard Oil Co. v. Perkins, 347 F.2d 379, 383 n.5 (9th Cir. 1965).

4. *Zeno*, 238 F.R.D. at 178 (quoting Ford's corporate designee).

This gambit—a sophisticated corporate entity arguing that its own preprinted, non-negotiated, standard-form contracts are ambiguous—has quietly become the first line of defense in breach of contract class actions.[5] To certify a class, plaintiffs must prove that common issues of law and fact predominate over individual issues.[6] However, if a contract is ambiguous—reasonably susceptible to more than one construction—a court must admit individualized extrinsic evidence to clarify its meaning. In a class action for breach of an ambiguous form contract, this unique "testimony from literally thousands of customers"[7] would contravene the predominance requirement. Thus, although courts routinely recite that "[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication,"[8] they just as routinely refuse to certify classes if a standard-form contract is opaque.[9]

On one level, this perverse trend reflects a dissonance between the principles of contractual interpretation and the principles of civil procedure. But lurking beneath the surface is a

5. *See, e.g.*, Adams v. Kan. City Life Ins. Co., 192 F.R.D. 274, 280 (W.D. Mo. 2000) ("KCL argue[s] that the words in question present ambiguities . . . ."); Mann v. GTE Mobilnet of Birmingham Inc., 730 So. 2d 150, 154 (Ala. 1999) ("GTEM argues that . . . its cellular service contracts are ambiguous . . . ."); Carder Buick-Olds Co. v. Reynolds & Reynolds, Inc., 775 N.E.2d 531, 538 (Ohio Ct. App. 2002) ("Reynolds further claims that even if language in the relevant contracts is identical, the language is ambiguous.").

6. *See, e.g.*, FED. R. CIV. P. 23(b)(3); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1056 (2005) (noting that "[p]redominance is a certification factor in forty-five of the forty-eight states with rules or statutes permitting class actions").

7. Lackey v. Cent. Bank of the S., 710 So. 2d 419, 422 (Ala. 1998).

8. Keating v. Super. Ct., 645 P.2d 1192, 1207 (Cal. 1982) (quoting LaSala v. Am. Sav. & Loan Ass'n, 489 P.2d 1113 (Cal. 1971)); *see also* Kase v. Salomon Smith Barney, Inc., 218 F.R.D. 149, 155 (S.D. Tex. 2003) ("An action primarily involving interpretation of a form contract is well suited for class adjudication . . . ."); Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 692 (N.D. Ga. 1983) ("When viewed in light of Rule 23, claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action . . . .").

9. *See, e.g.*, Pastor v. State Farm Mut. Auto. Ins. Co., No. 05 C 1459, 2005 WL 2453900, at *7 (N.D. Ill. Sept. 30, 2005); *Adams*, 192 F.R.D. at 282; Doe v. Guardian Life Ins. Co. of Am., 145 F.R.D. 466, 476 n.9 (N.D. Ill. 1992); Wilcox Dev. Co. v. First Interstate Bank of Or., N.A., 97 F.R.D. 440, 445 (D. Or. 1983); Graybeal v. Am. Sav. & Loan Ass'n, 59 F.R.D. 7, 15 (D.D.C. 1973); Gen. Motors Acceptance Corp. v. Dubose, 834 So. 2d 67, 72–73 (Ala. 2002) (per curium) (plurality opinion); Compass Bank v. Snow, 823 So. 2d 667, 677 (Ala. 2001); *Mann*, 730 So. 2d at 154; Fletcher v. Sec. Pac. Nat'l Bank, 23 Cal. 3d 442, 448 (1979); Hamwi v. Citinational-Buckeye Inv. Co., 140 Cal. Rtpr. 215, 221 (Ct. App. 1977); Medina v. Conseco Annuity Assur. Co., 121 P.3d 345, 349 (Colo. App. 2005); Hayes v. Motorists Mut. Ins. Co., 537 A.2d 330, 333 (Pa. Super. Ct. 1987); First Am. Nat'l Bank of Nashville v. Hunter, 581 S.W.2d 655, 660 (Tenn. Ct. App. 1978).

larger problem. Standard forms have all but subsumed the practice of contracting.[10] Computer users must agree to "clickwrap" contracts to download software and "browsewrap" contracts to visit websites.[11] Sellers use "rolling," "boxtop," "shrinkwrap," or "layered" contracts that arrive only after the buyer has agreed to the purchase.[12] Media enterprises require aggressive end-user license agreements that waive the viewer's intellectual property rights.[13] Corporations employ "standardized agreements to 'contractualize' discrete aspects of workers' obligations."[14] These omnipresent contracts raise autonomy and efficiency concerns. To be sure, mass-scale standardized terms save businesses the transaction costs of drafting particularized agreements,[15] the institutional costs of processing them, and the agency costs of policing the sales force.[16] They also permit businesses to shift risk systematically and therefore lower prices. However, most buyers sign standard-form contracts unread.[17] This makes such contracts hard to square with the liberal-individualistic understandings that the state

10. *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) ("[N]early all commercial and consumer sales contracts are form driven."); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) ("Standard form contracts probably account for more than ninety-nine percent of all the contracts now made."); *see also* 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS, § 24.27A, at 155 (rev. ed. Supp. 2008) ("[T]he bulk of contracts signed in this country are adhesion contracts.").

11. "Clickwrap" contracts typically appear in boxes on computer screens and prompt the user to agree to standard terms and conditions when installing software. *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 NYU. L. REV. 429, 431 (2002). "Browsewrap" contracts govern websites; users purportedly assent to them by visiting the site. *See id.*

12. The terms "rolling," "boxtop," "shrinkwrap," or "layered" refer to "pay now, terms later contracts." Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 681 (2004).

13. Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 48 (2007) ("[B]usiness entities systematically convert fair uses into breaches of contract, thereby fundamentally altering the copyright balance.").

14. Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 638 (2007).

15. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.8, at 116 (6th ed. 2003).

16. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1223 (1983).

17. *See* Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 237 (2007) ("The fact that consumers do not read standard form contracts is so well accepted and documented as to be virtually enshrined as dogma . . . .").

regulates promises between private actors out of respect for their free will[18] or based on moral obligations created by their consent to transfer rights.[19] Indeed, being bound to a duty to which one did not knowingly agree violates autonomy principles; likewise, consent must be informed to be meaningful. The fact that buyers may not read form contracts also threatens to belie the basic law and economics tenet that unfettered exchange maximizes wealth.[20] At one point, instrumentalist commentators took the position that because an elite cadre of consumers "shop" for favorable terms, the market steers sellers away from exploitative clauses and toward those that strike the ideal balance between risk and price.[21] But because standard-form contracts are non-negotiable and consist of a maze of inscrutable fine print, a reasonable consumer would probably not spend time trying to decipher their terms.[22] In addition, even if some consumers do shop for favorable terms, cognitive biases—including the tendency to fixate on a select few attributes when comparing products—prevent them from valuing terms correctly.[23] Thus, whether special rules should govern standard-form contracts has long been one of the most controversial issues in private law.[24]

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18. *See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 13 (1981) ("In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself.").

19. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) ("Consent is the moral component that distinguishes valid from invalid transfers of alienable rights.").

20. Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 603 (1990) ("In the case of consumer form contracts, there is actually a tendency towards inefficiency.").

21. *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 682 (1979) ("[W]hen markets are competitive, individuals are protected from the adverse consequences of making decisions in the face of imperfect information.").

22. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1995) (concluding that "most consumers will be rationally ignorant about [preprinted] terms"). Case law is slowly beginning to reflect this insight, most noticeably in the erosion of the duty to read. *Compare* Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361, 367 (S.D.N.Y. 1975) (upholding forum selection clause even though it was written in German, a language that plaintiff did not understand), *with* Drelles v. Mfrs. Life Ins. Co., 881 A.2d 822, 836 (Pa. Super. Ct. 2005) ("[A] non-commercial insured is under no duty to read the policy as issued and sent by the insurance company.").

23. *See* Korobkin, *supra* note 10, at 1223–25.

24. *See, e.g.*, KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (arguing that assenting to standard form terms means agreeing to "the broad type of the transaction [and] . . . any not unreasonable or inde-

This debate has focused almost exclusively on the unconscionability doctrine,[25] not the rules that courts use to interpret standard-form contracts. Despite receiving less attention, interpretive issues remain unsettled. In the late nineteenth century, judges began construing ambiguities in such contracts—first insurance policies and then all non-negotiated agreements—against the drafter under a robust version of the *contra proferentem* doctrine.[26] Historically, *contra proferentem* had been a last resort, invoked only if extrinsic evidence—the context of the agreement, the parties' relationship and correspondence, and industry customs—failed to resolve the uncertainty.[27] However, the version that governed standard-form contracts was markedly different. Rather than being the last step of the interpretive process, it was the first. Rather than being a tie-breaker, it was dispositive. It thus represented a kind of strict liability for imprecision.[28]

Yet as the phenomenon of class action defendants challenging their own contracts illustrates, strict liability *contra proferentem* is "on the wane."[29] Given contract law's gravitation away from formalism and toward holistic, fact-sensitive inquiries—especially its reliance on extrinsic evidence—a bright-line, against-the-drafter rule seems a blunt instrument.[30] Many courts have now relegated *contra proferentem* to its original role as a mere tie-breaker. Although scholars have not yet addressed the rule outside of the insurance context, within that milieu they have condemned it as "belittl[ing] the role of the written contract,"[31] "highly wasteful,"[32] "both anti-

cent terms the seller may have on his form"); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 638 (2002) (arguing that form terms should be enforceable so long as they "do not exceed some bound of reasonableness").

25. *See infra* text accompanying notes 194–95.

26. *Contra proferentem* is Latin for "against the drafter." *See infra* note 38.

27. *See* 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS, § 24.27, at 297 (Joseph M. Perillo ed., rev. ed. 1998).

28. *See* Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 538 (1996) (noting that the traditional conception of *contra proferentem* even applied to clauses that "could not reasonably be made less ambiguous").

29. Shelby County State Bank v. Van Diest Supply Co., 303 F.3d 832, 838 (7th Cir. 2002).

30. *See* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 499 (2004).

31. Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1119 (2006).

32. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1854 (1991).

quated and largely irrelevant,"[33] "a cloak under which courts may exercise an inordinate amount of discretion,"[34] and a source of "inefficient interpretations, uncertainty, and less readable contracts."[35]

I contend that the repudiation of strict liability *contra proferentem* stems from a misunderstanding about its normative core. The traditional rationale for *contra proferentem* hinges on control: to deter ambiguities, courts interpret them against the party responsible for the faulty language.[36] Academics have offered a second explanation: *contra proferentem* is a "penalty default rule" that facilitates information flow by making the drafter spell out the parties' rights and duties or suffer dire consequences.[37] But although these theories make sense in the context of "tie-breaking" *contra proferentem*, they are unpersuasive when it comes to its strict liability manifestation. For one, it is unclear why courts should adopt a draconian interpretive regime to encourage clarity and comprehensiveness in contracts that consumers rationally decide to ignore. Also, there is tension between information forcing, with its costly and time-consuming disclosure, and the fact that standard forms are valuable because they streamline transactions. Likewise, two other potential bases for the rule—that it ameliorates the problems inherent in standard-form contracts and redistributes wealth from firms to consumers—rest on dubious assumptions.

Here, I articulate a new justification for strict liability *contra proferentem*. I contend that judges and academics have failed to identify its underpinnings because they are looking in the wrong place. The strict against-the-drafter doctrine deters imprecision but not necessarily to influence the problematic relationship between consumers and the contents of the agreement. Instead, it does so to encourage singularity of meaning in mass-produced contracts. Standardization is valuable for businesses, but standardized agreements are not unless each

33. Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1396 (2007) (discussing the related doctrine of reasonable expectations in insurance law).

34. David S. Miller, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849, 1863 (1988).

35. Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 254 (1995).

36. *See infra* notes 145–47.

37. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 105 n.80 (1989).

term shares a uniform legal and semantic significance. Thus, firms lose if their forms are reasonably susceptible to multiple constructions. Yet firms also gain from using ambiguity strategically: they can obtain *de facto* class action waivers and manufacture room to adjust their own performance. Strict liability *contra proferentem* helps neutralize these opportunistic incentives. It also ensures that standardized contracts cannot mean different things to different consumers—a result that would tear at the fabric of contract law.

Part I sketches the history of *contra proferentem*. It reveals that courts have always struggled to distinguish between "tie-breaking" and strict liability *contra proferentem*. It also traces the decline of the strict against-the-drafter doctrine. Part II examines the conventional justifications for the rule—that it deters ambiguity, corrects unfairness, and redistributes wealth—and finds them wanting. Part III presents and defends my thesis. It argues that strict liability *contra proferentem* is best understood as a check on the use of strategic ambiguity. By giving drafters incentives to be precise, it deters inter-organizational confusion and thus allows drafters to capture the institutional, information, and agency savings of uniform contractual terms. Moreover, it gives standardized terms a single, overarching legal significance. Without the rule, drafters could assume individualized obligations through a standardized promise. This would saddle drafters with duties they could only fulfill through expensive, customized performances (if at all). In light of these points, a subtle doctrinal shift—making the rule a rebuttable presumption—could realign *contra proferentem* with its proper foundation.

## I. THE HISTORY OF *CONTRA PROFERENTEM*

*Verba fortius accipiuntur contra proferentem*—the maxim that the speaker assumes the risk of vagary in language[38]—dates back to sacral law, and has long existed in most Romanistic, common law, and code-based regimes.[39] Francis Bacon, a

38. The phrase translates to "[t]he words of an instrument shall be taken most strongly against the party employing them." HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 548 (Philadelphia, T. & J.W. Johnson & Co. 1864).

39. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 640 n.121 (1990) ("Every ambiguity had to be avoided ('in precibis nihil ambiguum esse debet') if one did not want to run the risk of being held bound, by the gods, to the (for them) more favourable interpretation of a promise."); *see also* State v. Executors of Worthington, 7 Ohio

prominent seventeenth-century intellectual, opined that the *contra proferentem* principle animated several procedural and substantive rules, from pleading requirements to statutory construction.[40] Throughout its early history, in its various manifestations, *contra proferentem* had a single irresistible rationale: interpreting ambiguity against the responsible party encourages the careful use of language.[41]

Yet during this time, *contra proferentem* played a minor role in contract interpretation. Because the doctrine does not illuminate the mutual intent of the parties—the "polestar, or lodestar of interpretation"[42]—courts from ancient Rome to Victorian England reserved its use for those cases where other interpretive canons failed.[43] Likewise, early American jurisprudence recognized that *contra proferentem* is "a rule of some strictness and rigor," only relevant "in absence of other rules which are of more equity and humanity."[44]

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171, 172 (1835) (acknowledging the Roman roots of *contra proferentem*); Péter Cserne, *Policy Consideration in Contract Interpretation: The Contra Proferentem Rule from a Comparative Law and Economics Perspective* 12–13 (Sept. 2007) (unpublished manuscript, on file with author) (noting that the *contra proferentem* rule is ubiquitous).

40. *See, e.g.,* Allen D. Boyer, *Light, Shadow, Science, and Law*, 92 MICH. L. REV. 1622, 1626 (1994) (book review).

41. *See, e.g.*, FRANCIS BACON, THE WORKS OF FRANCIS BACON 225 (London, Longman & Co. 1857) (stating that *contra proferentem* "mak[es] men watchful in their own business"); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND § 518, at 380 (William Carey Jones ed. 1916) ("[T]he principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words . . . ."); 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12, at 471–72 (4th ed. 1999) ("Since the language is presumptively within the control of the party drafting the agreement, . . . any ambiguity in that language will be interpreted against the drafter.").

42. 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 600, at 284–85 (Walter H.E. Jaeger ed., 3d ed. 1961).

43. BROOM, *supra* note 38, at 556 (*contra proferentem* "is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail"); ZIMMERMANN, *supra* note 39, at 640 (under Roman law, *contra proferentem* "was to be resorted to if determination of 'id quod actum est' [the parties' intent] had not been possible").

44. Field v. Harrison, Wythe 273, 288 (Va. High Ch. 1794), *available at* 1794 WL 638; *see also* Hartford Bridge Co. v. Union Ferry Co, 29 Conn. 210, 223 (1860) (declining to apply *contra proferentem* because "we do not feel ourselves driven to this extremity"); Varnum v. Thruston, 17 Md. 470, 496 (1861) (*contra proferentem* "is a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail"); 4 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 2054, at 3558 (1920) ("The rule *contra proferentem* is not one of the favored rules of construction. Indeed, it is said to be resorted to only when other rules fail." (italics added)).

Over the centuries, however, there were also glimmers of a notion that *contra proferentem* should apply with more force in certain situations. For instance, noting that loan agreements were one-sided, medieval philosopher Bartolous proposed that courts resolve ambiguity in them against creditors.[45] Similarly, where parties consummated deals across a great distance, making negotiations impossible, courts construed uncertainty against the drafter.[46] Nevertheless, scholars and judges had no reason to weave these isolated strands into a cohesive doctrine. But that would change with the emergence of the insurance industry in the last half of the nineteenth century.

### *A. The Ascent of the Insurance Industry and the Birth of Strict Liability* Contra Proferentem

The first underwriters sold marine insurance. In England, individual merchants insured each other in a remarkably informal fashion, meeting at Lloyd's Coffee House, a London inn.[47] Thus, insurers and insureds were often one and the same. In contrast, since the founding of the nation, corporations dominated the American insurance market.[48] But American port cities tended to be former British colonies, and along with the common law, they inherited the notion that insurance policies were quotidian agreements, struck between equals, to be enforced according to their terms. Post-colonial American courts therefore declined to apply *contra proferentem* to insurance policies.[49]

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45. *See* ZIMMERMANN, *supra* note 39, at 640–41.

46. For example, in *Manella, Pujals & Co. v. Barry*, 7 U.S. 415 (3 Cranch 1806), a Spanish conglomerate instructed an American merchant to "seek captains of fidelity, American born" to ship tobacco to Europe. *Id.* at 416. The merchant used foreign boats, which were captured. The merchant argued that the "3,000 miles distance" between the parties made *contra proferentem* appropriate. *Id.* at 432. Chief Justice Marshall agreed, holding that the instructions "only directed [the shipper] to employ neutral vessels." *Id.* at 442.

47. *See* WILLIAM REYNOLDS, HANDBOOK OF THE LAW OF INSURANCE 10 (1904).

48. *See* Christopher Kingston, *Marine Insurance in Britain and America, 1720–1844: A Comparative Institutional Analysis*, 67 J. ECON. HIST. 379, 396 (2007) ("By 1810 private underwriting had virtually disappeared in the United States . . . .").

49. *See, e.g.*, Palmer v. Warren Ins. Co., 18 F. Cas. 1056, 1058 (C.C. Mass. 1840) (No. 10,698) (reasoning that *contra proferentem* does not "supersede[ ] all other rules of construction"); Hodgkins v. Montgomery County Mut. Ins. Co., 34 Barb. 213, 217 (N.Y. App. Div. 1861) (declining to apply *contra proferentem* to an ambiguous insurance policy); Duerhagen v. United States Ins. Co., 2 Serg. & Rawle 309, 314 (Pa. 1816) (same); *see also* Snapp v. Merchants' & Manufacturers

Two revolutions in the insurance business prompted a reassessment. The first was the meteoric rise of the life insurance industry. In 1843, New York's first modern life insurance company, Mutual Life, was incorporated.[50] By 1904, twenty million Americans had taken out $14.6 billion in policies, making life insurance the country's primary savings vehicle.[51] The fact that insurers unilaterally dictated the policy terms made commentators uneasy.[52] Second, the industry began to sell fire insurance. Because fire was an urban scourge,[53] coverage became an economic necessity.[54] Most policies featured stringent warranties, which allowed insurers to deny coverage if the insured's application contained even trivial discrepancies.[55] Faced with standardized policies, where the meaning of a single provision could affect thousands of people, courts started approaching interpretation less as a way to resolve a particular dispute and more as a way to make sweeping policy judgments.[56]

Thus, in *First National Bank v. Hartford Fire Insurance Co.*, the United States Supreme Court, speaking through Justice Harlan, refused to adopt a fire insurer's view that an ambiguous clause disclaimed coverage—despite admitting that it was "most consistent with the literal import of the terms."[57] Because the Court acknowledged that the insurer's interpreta-

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Ins. Co., 8 Ohio St. 458, 464–65 (1858) (applying *contra proferentem* only after considering "extrinsic proofs").

50. Art Budros, *The Making of an Industry: Organizational Births in New York's Life Insurance Industry, 1842–1904*, 70 SOC. FORCES 1013, 1015 (1992).

51. *See id.*

52. *See* Patterson, *Life Insurance*, *supra* note 3, at 222 ("Furthermore, 'freedom of contract' rarely exists in these cases. Life insurance contracts are contracts of 'adhesion.' The contract is drawn up by the insurer and the insured, who merely 'adheres' to it, has little choice as to its terms." (footnote omitted)).

53. *See* Carol A. Chetkovich, *Eating Smoke: Fire in Urban America, 1800–1950*, 36 J. OF INTERDISC. HIST. 1, 106–07 (2005) (reviewing MARK TEBEAU, EATING SMOKE: FIRE IN URBAN AMERICA, 1800–1950 (2003)) ("In the nineteenth and early twentieth centuries, the destructive power of fire posed a major obstacle to the development of urban America.").

54. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 230–32 (1977).

55. *See* William R. Vance, *The History of the Development of the Warranty in Insurance Law*, 20 YALE L.J. 523, 524 (1911) ("A warranty by the assured in relation to the existence of a specific fact must be strictly true, or the policy will not take effect . . . ." (internal quotation marks omitted)).

56. For example, in *Carpenter v. Providence Washington Insurance Co.*, 41 U.S. (16 Pet.) 495, 510 (1842), Justice Story held that a warranty requiring the insured to notify the insurer of overlapping coverage was valid because it lowered premiums and thus increased the prevalence of fire insurance.

57. 95 U.S. 673, 678 (1877).

tion was better than the insured's but nevertheless found the existence of an ambiguity to be dispositive, the case marks the beginning of strict liability *contra proferentem*. Dozens of opinions would cite *First National Bank* for the proposition that "a policy of insurance, in the case of doubt as to its meaning, must be interpreted most strongly against the insurer."[58]

But the justification that *First National Bank* offered for this new rule was problematic. The Court explained that the insurer was strictly liable for the ambiguity because the insurer's "attorneys, officers, or agents [had] prepared the policy."[59] This reasoning, with its emphasis on the drafter's control over the contract, is the same as the rationale commonly given for the traditional "tie-breaker" version of *contra proferentem*. The Court thus failed to lay a distinct conceptual foundation for the robust new doctrine.

Moreover, many agreements, not just insurance policies, are written entirely by one party. Accordingly, relying on *First National Bank*, courts applied strict liability *contra proferentem* to a variety of contracts: mortgages,[60] leases,[61] fidelity

58. Provident Sav. Life Assur. Soc. v. Taylor, 142 F. 709, 713 (3d Cir. 1906); *see also* Mutual Life Ins. Co. of N.Y. v. Hurni Packing Co., 263 U.S. 167, 174 (1923); Liverpool & London & Globe Ins. Co. v. Kearney, 180 U.S. 132, 136 (1901); London Assur. v. Companhia De Moagens Do Barreiro, 167 U.S. 149, 159–68 (1897); Imperial Fire Ins. Co. v. County of Coos, 151 U.S. 452, 462 (1894); Thompson v. Phenix Ins. Co., 136 U.S. 287, 297 (1890); Moulor v. Am. Life Ins. Co., 111 U.S. 335, 341–42 (1884) (extending rule to life insurance); Franklin Life Ins. Co. v. William J. Champion & Co., 350 F.2d 115, 122 (6th Cir. 1965); Ocean Accident & Guarantee Corp. v. Aconomy Erectors, Inc., 224 F.2d 242, 247 (7th Cir. 1955); Aetna Ins. Co. v. Sacramento-Stockton S.S. Co., 273 F. 55, 58 (9th Cir. 1921); W. Union Tel. Co. v. Hughes, 228 F. 885, 888 (4th Cir. 1915); Miller v. M.D. Casualty Co., 193 F. 343, 349 (3d Cir. 1912); Order of United Commercial Travelers of Am. v. McAdam, 125 F. 358, 362–63 (8th Cir. 1903); McClain v. Provident Sav. Life Assur. Soc., 110 F. 80, 88 (3d Cir. 1901); Hubbard v. Mut. Reserve Fund Life Ass'n, 100 F. 719, 721 (1st Cir. 1900); Fid. & Cas. Co. of N.Y. v. Lowenstein, 97 F. 17, 19–20 (8th Cir. 1899); Rogers v. Home Ins. Co. of N.Y., 95 F. 109, 110 (2d Cir. 1899); Travelers' Ins. Co. v. Randolph, 78 F. 754, 761–62 (6th Cir. 1897); St. Paul Fire & Marine Ins. Co. v. Kidd, 55 F. 238, 240 (2d Cir. 1893); Steel v. Phenix Ins. Co. of Brooklyn, 51 F. 715, 722–23 (9th Cir. 1892); Sheerer v. Manhattan Life Ins. Co., 16 F. 720, 722 (C.C. Ky. 1883).

59. *First Nat'l Bank*, 95 U.S. at 679; *see also* ROWLAND H. LONG, RICHARDS ON THE LAW OF INSURANCE, § 74, at 114–15 (4th ed. 1932) (explaining that strict liability *contra proferentem* stems from the fact that "[t]he assured ordinarily has no part in the preparation of the policy").

60. Planters Nat. Bank of Mena v. Townsend, 123 S.W.2d 527, 535 (Ark. 1938); Owens v. Graetzel, 126 A. 224, 228 (Md. 1924); Patterson v. Miller, 227 N.W. 674, 666–67 (Mich. 1929).

61. Schmohl v. Fiddick, 34 Ill. App. 190, 196 (1889); Flanders v. Motor Sales & Service, 118 So. 387, 388 (La. Ct. App. 1928).

bonds,[62] product warranties,[63] bills of lading,[64] a professional fee arrangement,[65] an agreement to build an ice plant,[66] and a letter from a packing company.[67] They did so without regard to the non-drafting party's wealth or status. For example, one court interpreted an agreement in favor of the Coca Cola Bottling Company;[68] another construed an employment agreement against the employee because "the contract, though purporting to originate with the company, was actually drawn by [the employee]."[69] Paradoxically, many of these opinions also seem to hold that the drafting party's interpretation of the disputed clause is unreasonable—which should obviate the need for any canon of construction, let alone *contra proferentem*.[70] Adding to this uncertainty, courts in analytically indistinct cases continued to call *contra proferentem* a "last resort"[71] and "[a] secondary rule of construction."[72] Likewise, the first Restatement of

62. Brandon v. Holman, 41 F.2d 586, 587–88 (4th Cir. 1930).

63. Denholm Shipping Co. v. W.E. Hedger Co., 47 F.2d 213, 214 (2d Cir. 1931); Ebbert v. Phila. Elec. Co., 198 A. 323, 328 (Pa. 1938).

64. Louisville & N.R. Co. v. Williams, 73 So. 548, 548–49 (Ala. 1916).

65. Amick v. Hickey, 235 N.W. 859, 860 (Mich. 1931).

66. Wilson v. Cooper, 95 F. 625, 628 (C.C.D. Neb. 1899).

67. Kirwan v. Van Camp Packing Co., 39 N.E. 536, 538 (Ind. Ct. App. 1895).

68. S. Ry. Co. v. Coca Cola Bottling Co., 145 F.2d 304, 307 (4th Cir. 1944) ("This contract was drawn by Southern. It was signed, as so drawn, by Coca Cola without the change of a word."). However, other courts declined to apply *contra proferentem* where the non-drafting party was represented by counsel. *See* Elliott v. Pikeville Nat. Bank & Trust Co., 128 S.W.2d 756, 760 (Ky. Ct. App. 1939) ("The rule should not strictly apply here, for, although it is admitted that when first shown to Mr. Elliott, he agreed that he would later sign the letter, but waited more than a month and then signed, after showing it to his son and later to an attorney."); Bee Bldg. Co. v. Peters Trust Co., 183 N.W. 302, 304 (Neb. 1921) ("The rule that a written contract will be most strictly construed against the party drafting it has no application to a case where it appears that in its execution both parties were represented by their attorneys, who approved the lease.").

69. Charles Behlen Sons' Co. v. Ricketts, 164 N.E. 436, 438 (Ohio Ct. App. 1928).

70. *See, e.g.*, Schmohl v. Fiddick, 34 Ill. App. 190, 198 (1889) (applying *contra proferentem* after "conceding that the clause in this lease in question is not so obscure or uncertain as to require any parol evidence to disclose the true meaning of the parties or explain any ambiguity"); Glenmary Land Co. v. Stewart, 290 S.W. 503, 504 (Ky. Ct. App. 1927) ("While the contract before us does not seem to be susceptible of more than one meaning, yet, if it is, that meaning must be attributed to it which is strongest in favor of appellee, Stewart, and strongest against the appellant land company.").

71. Stanton v. Erie R. Co., 116 N.Y.S. 375, 378 (App. Div. 1909).

72. Hurd v. Ill. Bell Tel. Co., 136 F. Supp. 125, 134 (D.C. Ill. 1955) ("At best it is a secondary rule of interpretation, a 'last resort' which may be invoked after all of the ordinary interpretative guides have been exhausted . . . ."); Warfield Natural Gas Co. v. Clark's Adm'x, 79 S.W.2d 21, 26 (Ky. Ct. App. 1934) (refusing to apply *contra proferentem* unless "doubt remained as to the propriety and reason-

Contracts, published in 1932, categorized *contra proferentem* as a subservient rule, despite noting that it "finds frequent application in regard to policies of insurance, which are ordinarily prepared solely by the insurance company."[73] Thus, from its inception, strict liability *contra proferentem*'s scope and normative basis were unclear.

### *B. Contracts of Adhesion*

As the twentieth century progressed, vertical integration and demand for consumer durables made standard form agreements part of daily life.[74] In an influential 1943 article, Friedrich Kessler popularized the expression "contract of adhesion."[75] Like Karl Llewellyn, who had briefly addressed the issue four years earlier,[76] Kessler struggled to rectify the observations that standard form agreements are unilaterally imposed and rarely understood with the classical paradigm of contracts as the product of mutual assent.[77] Kessler broke new ground, however, by attributing oppressive terms to the economic disparity between the drafter and the adherent.[78] This

ableness of this construction"); Bullowa v. Thermoid Co., 176 A. 596, 602 (N.J. 1935).

73. RESTATEMENT OF CONTRACTS § 236 cmt. d (1932).

74. *See* MANSEL G. BLACKFORD, A HISTORY OF SMALL BUSINESS IN AMERICA 102 (2d ed. 2003) ("During the 1920s, 1930s, and 1940s . . . America became a consumer society. That is, businesses sold an even wider range of goods—automobiles, electric stoves, radios, and the like—to the public."); MARK RUPERT, PRODUCING HEGEMONY: THE POLITICS OF MASS PRODUCTION AND AMERICAN GLOBAL POWER 59–70 (1995) (describing the social and economic forces that led to increasing standardization in the American economy).

75. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

76. Karl Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700 (1939) (reviewing O. PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937)).

77. *See* Kessler, *supra* note 75, at 632, 639 ("[T]echnical doctrines of the law of contracts cannot possibly provide courts with the right answers."); Llewellyn, *supra* note 76, at 700–01 ("[W]hen contract ceases to be a matter of dicker, bargain by bargain, and item by item, and becomes in any field or any outfit's business or any trade's practice a matter of mass production of bargains . . . the presuppositions of our general law no longer maintain . . . .").

78. Kessler, *supra* note 75, at 632 ("Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms . . . .").

additional dimension resonated with judges, who began to regard mass-produced form contracts with skepticism.[79]

It also clarified the normative case for strict liability *contra proferentem*. Courts divided all contracts into two classes: "normal" contracts and suspect "adhesion" contracts. Because strict liability *contra proferentem* only governed adhesion contracts, the circumstances in which the doctrine applied and the definition of an adhesion contract were coterminous.[80] Rather than focusing on the drafter's dominion over the terms, courts characterized a contract as "adhesive"—and concomitantly applied strict liability *contra proferentem*—if the other party "lack[ed] the economic strength to change such language."[81] In addition, some jurisdictions required the adhering party to show that the desired goods or services were invariably tied to standard-form agreements.[82] These justifications for strict liability *contra proferentem* sharpened its contours. For the first time, courts declined to apply it to contracts between equals.[83]

79. *See, e.g.*, Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 204–05 (2d Cir. 1955) (Frank, J., dissenting) (arguing that in the context of a "standardized or massproduction agreement, with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the idea of 'freedom of contract,' cannot be applied rationally"); Barrette v. Home Lines, Inc., 168 F. Supp. 141, 143 n.4 (S.D.N.Y. 1958) (invalidating clause in cruise ship ticket that required plaintiff to serve process within a year because it was "presented on a take-it-or-leave-it basis to one in a disadvantageous bargaining position"); Perkins v. Standard Oil Co., 383 P.2d 107, 112 (Or. 1963) (opining that adhesion contracts "should be construed with an awareness of the inequality of the bargainers").

80. *See, e.g.*, Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966) ("These principles of interpretation of insurance contracts have found new and vivid restatement in the doctrine of the adhesion contract.").

81. Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Ct. App. 1961); *see also* N.Y., New Haven & Hartford R.R. Co. v. Nothnagle, 346 U.S. 128, 136 (1953) ("[T]he carrier and the individual customer are not on an equal footing."); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 75 (N.J. 1960) (noting that because a consumer's "capacity for bargaining is so grossly unequal, the inexorable conclusion which follows is that he is not permitted to bargain at all").

82. *See, e.g.*, Ury v. Jewelers Acceptance Corp., 38 Cal. Rptr. 376, 381 (Ct. App. 1964) (the non-drafting party "must 'adhere' completely or forego the product or service"); Albuquerque Tire Co., Inc. v. Mountain States Tel. & Tel. Co., 697 P.2d 128, 132 (N.M. 1985) (the non-drafting party "could not have avoided doing business" with the drafter); Miner v. Walden, 422 N.Y.S.2d 335, 337 (App. Div. 1979) ("[T]he consumer cannot obtain the desired product or services except by acquiescing to the form of the contract." (internal citations omitted)).

83. *See, e.g.*, David Crystal, Inc. v. Cunard S.S. Co., 339 F.2d 295, 301 (2d Cir. 1964) (Friendly, J., concurring and dissenting) ("Whatever may be the case with contracts of adhesion, when a contract is made at arms' length between two business concerns . . . our duty is to read the words, in their setting, with icy neutrality."); Walnut Creek Pipe Distribs., Inc. v. Gates Rubber Co. Sales Div., 39 Cal. Rptr. 767, 771 (Ct. App. 1964) ("There was no finding by the court that the con-

When courts did invoke it, they trumpeted its normative underpinnings, reasoning that it "does not serve as a mere tie-breaker; [but] rests upon fundamental considerations of policy."[84] However, this respite of stability and consensus would not last long.

### *C. The Antiformalist Revolution in Contractual Interpretation*

The twentieth century saw the erosion of many rigid contract rules.[85] In the late 1960s, this trend began affecting the way courts construed contracts. Some jurisdictions softened the parol evidence rule and allowed the parties to use extrinsic evidence to cast new light even on ostensibly clear words.[86] In insurance law, the reasonable expectations doctrine empowered courts to ignore terms that the insured had justly not thought to be part of the policy. These new approaches pushed the construction process away from dogmatic reliance on the agreement's text and toward flexible, fact-intensive inquiries. Not only did they make the mechanical consequences of strict

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tract was one of 'adhesion,' nor would the facts justify such a finding. There is no evidence that the parties in the instant case were not bargaining as equals . . . ."); Seligson, Morris & Neuburger v. Fairbanks Whitney Corp., 257 N.Y.S.2d 706, 713 (App. Div. 1965) (refusing to apply *contra proferentem* when "the persons who participated in the making of the written agreement were sophisticated persons with extensive business, and some with legal, training").

84. Steven v. Fid. & Cas. Co. of N.Y., 27 Cal.Rptr. 172, 178 (1962).

85. *See* Katz, *supra* note 30, at 498–501 (noting that the changes included less emphasis on doctrines such as consideration, indefiniteness, and lack of mutuality, and the death of the mirror image rule); ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 127–44 (1997) (discussing the debate between formalism and contextualism); Eric A. Posner, *The Decline of Formality in Contract Law*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 61, 68 (F.H. Buckley ed., 1999) (citing the unconscionability doctrine as being antiformalist). The pendulum has since swung back, at least among academics. *See, e.g.*, John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 892–99 (2002) (summarizing the literature).

86. The parol evidence rule and the rules that regulate the use of extrinsic evidence in contractual interpretation operate in tandem. The traditional version of the parol evidence rule forbade courts from considering extrinsic evidence unless a contract was facially ambiguous, incomplete, or allegedly the product of fraud. When states began to permit courts to examine extrinsic evidence to determine whether a contact contains an ambiguity, they simultaneously relaxed the parol evidence rule. *See, e.g.*, Eric A Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534, 537–49 (1998) (evaluating both "hard" and "soft" versions of the parol evidence rule).

liability *contra proferentem* seem anachronistic, but, as discussed below, they raised questions about its viability that have never been answered.

### 1. *Pacific Gas & Electric Company* and Its Progeny

The decline of formalism in contractual interpretation began with a seemingly unremarkable two-page opinion interpreting an indemnity clause in an adhesion contract.[87] The clause required a contractor to "indemnify" the Pacific Gas and Electric Company ("PG&E") "against all loss . . . in any way connected with the performance of this contract."[88] PG&E asserted that this language meant that the contractor had to pay for damaging a steam turbine. A California appellate court disagreed. It held that because "indemnify" usually refers to reimbursement for third-party claims, not claims between the contracting parties, the agreement was ambiguous.[89] "Resolving all doubts against the drafter of the . . . adhesion contract, as we should," the court rejected PG&E's construction.[90]

As generations of law students have learned, the California Supreme Court granted review and, in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*,[91] introduced a new method of contract interpretation. Rejecting the "four corners" rule, which allowed courts to examine the parties' relationship, negotiations, and circumstances only if a contract was facially ambiguous, Chief Justice Traynor held that courts must provisionally receive extrinsic evidence when deciding whether language is reasonably susceptible to more than one reading:

> Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms . . . . Accordingly, rational interpretation re-

87. Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 62 Cal. Rptr. 203 (Ct. App. 1967), *vacated*, 442 P.2d 641 (Cal. 1968).
88. *Id.* at 204.
89. *Id.*
90. *Id.* at 204–05.
91. 442 P.2d 641 (Cal. 1968).

> quires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.[92]

The supreme court did not acknowledge that the case involved an adhesion contract, but its holding seemed to sound the death knell for strict liability *contra proferentem*. For one, it refused to endorse the appellate court's analysis, which had turned entirely on the strict against-the-drafter doctrine.[93] Moreover, the supreme court's contextualist approach and emphasis on honoring the parties' intent[94] were fundamentally at odds with an inflexible rule that "does not assist in determining the meaning that the two parties gave to the words," but is "a rule of policy, generally favoring the underdog."[95] Finally, strict liability *contra proferentem* historically had barred adhesion contract drafters from offering extrinsic evidence. It would have been futile for such a party to submit extra-contractual proof to uncover or resolve an ambiguity. Indeed, the mere existence of an ambiguity was fatal. Thus, by bestowing a comprehensive right to rely on extrinsic evidence,[96] the supreme court appeared to abandon the strict against-the-drafter rule.

However, three years later, in *Tahoe National Bank v. Phillips*,[97] the California Supreme Court contradicted itself. A bank offered testimony to prove that an assignment of rents securing a loan also gave it the power to foreclose on the borrower's property. The supreme court first examined the contract's plain language and held that it was not reasonably susceptible to the bank's construction.[98] It then invoked strict liability *contra proferentem* and declined to evaluate whether the bank's testimony changed this result:

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92. *See id.* at 645.

93. *Pac. Gas & Elec. Co.*, 62 Cal. Rptr. at 204–05.

94. *Pac. Gas & Elec. Co.*, 442 P.2d at 644–45.

95. CORBIN, *supra* note 27, § 24.27, at 306 (explaining also that the rule does not even help determine "the meaning that a reasonable person would have assigned to the language used").

96. Although the supreme court did not expressly confer the right to offer extrinsic evidence on drafters of adhesion contracts—it merely held that the trial court erred by refusing to let the non-drafting contractor offer extrinsic evidence—it nevertheless couched its opinion in all-inclusive terms. *See, e.g.*, *Pac. Gas & Elec. Co.*, 442 P.2d at 644 ("In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties.").

97. 480 P.2d 320 (Cal. 1971).

98. *Id.* at 326–27.

> Since the alleged ambiguities appear in a standardized contract, drafted and selected by the bank, which occupies the superior bargaining position, those ambiguities must be interpreted against the bank. . . . [I]n determining whether an instrument is reasonably susceptible to an interpretation suggested by the extrinsic evidence, one factor for consideration by the court is whether that interpretation would do violence to the principles of construing documents against the party who drafts and selects them.[99]

As the dissent correctly noted, by rejecting the bank's interpretation without considering extrinsic evidence, the majority turned *Pacific Gas & Electric Co.* on its head.[100] In subsequent years, as many other states adopted California's view on the use of extrinsic evidence,[101] they also imported this uncertainty about whether strict liability *contra proferentem* had survived.[102]

### 2. The Doctrine of Reasonable Expectations

The antiformalist trend in contractual interpretation continued with the recognition of the reasonable expectations doctrine in insurance law. First articulated in 1970 by Robert Keeton, the expectations principle honors an insured's reason-

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99. *Id.* at 327 (internal footnote and citations omitted).

100. *See id.* at 332 (Sullivan, J., dissenting) ("Under *Thomas Drayage* we must consider the extrinsic evidence as well as the Assignment itself in making this determination. This indispensable task, the majority ignore.").

101. *See, e.g.*, Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 771 n.1 (Alaska 1982); Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1140–41 (Ariz. 1993) (en banc); William Blair & Co. v. FI Liquidation Corp., 830 N.E.2d 760, 773–74 (Ill. App. Ct. 2004); Admiral Builders Sav. & Loan Assoc. v. South River Landing, Inc., 502 A.2d 1096, 1099 (Md. Ct. Spec. App. 1986); Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P., 952 P.2d 435, 446 (N.M. Ct. App. 1997); Denny's Rests., Inc. v. Sec. Union Title Ins. Co., 859 P.2d 619, 626 (Wash. Ct. App. 1993). Other jurisdictions require courts provisionally to consider whether specific kinds of extrinsic evidence reveal an ambiguity. *See, e.g.*, Neb. Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1041 (8th Cir. 2000) ("In determining whether a contract is ambiguous, under Nebraska law, a court may look to course of performance evidence."); Fire Ins. Exch. v. Rael, 895 P.2d 1139, 1143 (Colo. App. 1995) (courts can consider contextual evidence but not "the parties' own extrinsic expressions of intent"); Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc., 164 P.3d 851, 866 (Mont. 2007) (same).

102. Even courts in jurisdictions that ostensibly apply the plain meaning rule often look far beyond the agreement's four corners. *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1731 (1997) (arguing that judges use the plain meaning rule "mainly as a rhetorical device, aimed at disguising the active role [they] play in contract interpretation").

able beliefs about the scope of coverage "even though painstaking study of the policy provisions would have negated those expectations."[103] On the heels of Keeton's article, several jurisdictions claimed to embrace this formulation of the doctrine.[104] However, the rule proved to be easier stated than applied, and courts began to invoke it in wildly different ways. Most asked whether a hypothetical reasonable insured would have anticipated coverage, but others credited the insured's subjective testimony on the issue.[105] Some refused to enforce unambiguous exclusions that were "hidden"[106] or "bur[ied]"[107] in the policy. Others insisted that ambiguity was a precondition for the doctrine.[108] Still others gave no indication of what they were doing.[109]

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103. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

104. *See, e.g.*, Lambert v. Liberty Mut. Ins. Co., 331 So. 2d 260, 263 (Ala. 1976); Nat'l Indem. Co. v. Flesher, 469 P.2d 360, 365–66 (Alaska 1970); Sparks v. Republic Nat'l Life Ins. Co., 647 P.2d 1127, 1135 (Ariz. 1982) (en banc); Thompson v. Occidental Life Ins. Co., 513 P.2d 353, 364 (Cal. 1973) (en banc); Davis v. M.L.G. Corp., 712 P.2d 985, 990–91 (Colo. 1986) (en banc); Sturla, Inc. v. Fireman's Fund Ins. Co., 684 P.2d 960, 964 (Haw. 1984); Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973); Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co., 193 N.W.2d 752, 754 (Neb. 1972); Sullivan v. Dairyland Ins. Co., 649 P.2d 1357, 1359 (Nev. 1982); Magulas v. Travelers Ins. Co., 327 A.2d 608, 610 (N.H. 1974); Perrine v. Prudential Ins. Co. of Am., 265 A.2d 521, 524 (N.J. 1970); Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1353 (Pa. 1978).

105. *See, e.g.*, *Sparks*, 647 P.2d at 1135 (upholding coverage because "[t]his was the understanding of Suzanne Sparks after she had read defendant's policy"). *But see* Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1153 (1981) ("[A]lthough literal application of the principle seems to require that the insured in question actually expected coverage[,] . . . courts have generally focused instead on whether any reasonable insured might have expected coverage.").

106. Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del. 1982).

107. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975); *see also* Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 827 (1990) ("the doctrine of reasonable expectations . . . may apply without regard to any ambiguity.").

108. *See, e.g.*, Wolf Mach. Co. v. Ins. Co. of N. Am., 183 Cal. Rptr. 695, 697 (Ct. App. 1982) ("[T]he doctrine of reasonable expectation of coverage comes into play only where there is an ambiguity present in the policy."); Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1467 n.32 (1989) (collecting cases).

109. *See, e.g.*, Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 370 (1986) ("All too often, the courts announce their judgment as to what expectation the average insured would or would not have without identifying the factors they have considered in reaching that decision.").

This chaos stunted the growth of the reasonable expectations rule[110] and affected strict liability *contra proferentem* in two ways. First, it generated a blanket skepticism about the propriety of special interpretive canons for standard-form contracts. With little analysis, scholars extended criticisms of the reasonable expectations rule to rules that governed all form contracts.[111] Second, because the reasonable expectations doctrine was so amorphous, it bled into the non-insurance environment, undermining the strict against-the-drafter rule. Reasonable expectations, though "phrased as a sword for the policyholder" is actually often "a shield for the insurer, for under the [rule], the reasonable expectations of the policyholder limit the reach of *contra proferentem*."[112] As a result, when judges confused the doctrines, they diluted the potency of strict liability *contra proferentem*.[113] Even if an adhesion contract was ambiguous, the drafter could still prevail if other factors counseled against applying the rule. The fall of the strict against-the-drafter doctrine had begun.

### *D. The Decline of Strict Liability* Contra Proferentem

The decline of strict liability *contra proferentem* continued in the 1970s, when the class action device came into vogue.[114] Claims for breach of mass-produced form contracts seemed well-suited for aggregation. Indeed, courts initially reasoned that "the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class

110. *See, e.g.*, Kenneth S. Abraham, *The Expectations Principle as a Regulative Ideal*, 5 CONN. INS. L.J. 59, 61 (1998–99) (noting that only a third of the states have adopted the reasonable expectations doctrine and arguing that it is "limited to the point of being of minor significance").

111. *See* Rappaport, *supra* note 35, at 254 ("In general, the ambiguity rule is no more attractive outside of insurance than within.").

112. Abraham, *supra* note 28, at 547.

113. Non-insurance cases that refer to the reasonable expectations rule include *Seawright v. American General Financial Services, Inc.*, 507 F.3d 967, 976 (6th Cir. 2007) (applying Tennessee law); *Yeng Sue Chow v. Levi Strauss & Co.*, 122 Cal. Rptr. 816, 821 (Ct. App. 1975), *Dairy Farm Leasing Co., Inc. v. Hartley*, 395 A.2d 1135, 1139 n.3 (Me. 1978), *Hartland Computer Leasing Corp., Inc. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527–28 (Mo. Ct. App. 1989), and *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259, 1261 (Nev. 1985).

114. *See* ALBA CONTE & HERBERT B. NEWBERG, 5 NEWBERG ON CLASS ACTIONS, § 17 (4th ed. 2007); DEBORAH R. HENSLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 18–24 (2000); Bruce I. Bertelsen et al., Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1129 n.39, 1131–32 (1974) (finding that the number of class actions filed in the District of Columbia between 1966 and 1973 increased by roughly sixty percent).

will share a common interest in the interpretation of an agreement."[115] But the lack of consensus regarding interpretation of standard-form contracts gave defendants a golden opportunity at the certification stage. Defendants began to argue that their absolute right to present plaintiff-specific evidence was inconsistent with the requirement that common issues predominate.[116] In jurisdictions that continued to follow the "four corners" rule, defendants took the position that ambiguities in their own draftsmanship required the admission of individualized proof.[117]

A few courts dismissed these theories, citing *Tahoe National Bank*, ignoring *Pacific Gas and Electric Co.*, and determining that strict liability *contra proferentem* obviated the need for extrinsic evidence.[118] But two factors made this the minority perspective. First, because the strict against-the-drafter rule conclusively established the meaning of the disputed language, it violated the prohibition on adjudicating the merits at the certification stage.[119] Second, because the doctrine is an extreme measure, and courts were unsure whether it remained viable, they shied away from it.[120] Defendants' claims about the interplay between extrinsic evidence and class

115. LaSala v. Am. Sav. & Loan Ass'n., 489 P.2d 1113, 1121 (Cal. 1971); *see also* Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 692 (N.D. Ga. 1983) ("[C]laims arising from interpretations of a form contract appear to present the classic case for treatment as a class action . . . .").

116. *See supra* note 6.

117. *See supra* note 5.

118. *See, e.g.*, McGhee v. Bank of Am., 131 Cal. Rptr. 482, 486 (Ct. App. 1976) (holding that trial courts erred by denying certification or granting motions for decertification in class actions for breach of standardized deeds of trust because if the deeds were adhesive, they would be construed against the drafter without resort to extrinsic evidence); Wilson v. S.F. Fed. Sav. & Loan Assn., 132 Cal. Rptr. 903, 905 (Ct. App. 1976) (holding that because "deeds of trust must reasonably be considered contracts of adhesion," the trial court erred by decertifying a class action on the ground that common issues would not predominate).

119. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) ("[A] preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials.").

120. For example, only four published decisions after 1978 have cited *Tahoe National Bank* for its discussion of contract principles. *See* Vallely Invs., L.P. v. BancAmerica Commercial Corp., 106 Cal. Rptr. 2d 689, 701 (Ct. App. 2001); Fed. Nat'l Mortgage Assn. v. Bugna, 67 Cal. Rptr. 2d 233, 236 (Ct. App. 1997); Shell W. E & P, Inc. v. County of Lake, 274 Cal. Rptr. 313, 317 (Ct. App. 1990); Fireman's Funds Ins. Co. v. Fibreboard Corp., 227 Cal. Rptr. 203, 208 (Ct. App. 1986). Conversely, according to a Westlaw search run in April 2008, *Pacific Gas & Electric Co.* has been cited 3141 times.

actions gained momentum.[121] Nothing illustrates the conceptual and doctrinal disarray better than the fact some courts announced that "claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action,"[122] while others declared that "[b]y their very nature, the claims for breach of contract . . . do not lend themselves to class action treatment."[123]

*Mann v. GTE Mobilnet of Birmingham, Inc.*[124] showcases this confusion. A cellular service provider's contract stated that it would bill customers "per minute" of airtime.[125] In fact, the provider rounded up fractions of minutes. When a customer brought a class action for breach of contract, the provider argued that certification was improper because the contract was ambiguous. A divided Alabama Supreme Court agreed. The majority held that clarifying the ambiguity would require evidence that would "vary from case to case."[126] The dissent was at a loss to understand why the majority had overlooked the "long-standing rule" of strict liability *contra proferentem*.[127]

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121. *See, e.g.*, Wilcox Dev. Co. v. First Interstate Bank of Oregon, N.A., 97 F.R.D. 440, 445 (D. Or. 1983) (denying class certification because breach of contract cause of action "would require individual inquiry into each class member's understanding or knowledge of the term to determine whether or not that individual is a member of the class"); Fletcher v. Sec. Pac. Nat'l Bank, 591 P.2d 51, 55 (Cal. 1979) (affirming trial court's denial of class certification on claim that bank breached standardized loan agreement because "there was no ready method, other than examining each of the individual borrowers, to determine the number and identity of the class members who had valid contract claims"); First Am. Nat'l Bank of Nashville v. Hunter, 581 S.W.2d 655, 659 (Tenn. Ct. App. 1978) (denying class certification after uncovering an "uncertainty of detail (latent ambiguity) [that] must be resolved by inquiry regarding the actual intent of the parties as to the meaning of the words used by them").

Even the mere variation between different states' approaches to the use of extrinsic evidence could, by itself, doom an attempt to certify a nationwide class. *See* Ritti v. U-Haul Int'l, Inc., No. 05-4182, 2006 WL 1117878, at *14 (E.D. Pa. Apr. 26, 2006) (refusing to certify class because "I will be required to apply the laws of numerous states to determine the terms of the class members' contracts"); Bowers v. Jefferson Pilot Fin. Ins. Co., 219 F.R.D. 578, 583 (E.D. Pa. 2004) (refusing to certify class due to "significant variation in the laws of the states with respect to the use of extrinsic evidence"). *But see* Steinberg v. Nationwide Mut. Ins. Co., 224 F.R.D. 67, 77–78 (E.D.N.Y. 2004) (rejecting this argument after receiving a detailed fifty-state summary of the law from plaintiffs' counsel).

122. Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 692 (N.D. Ga. 1983).

123. Graybeal v. Am. Sav. & Loan Ass'n, 59 F.R.D. 7, 15 (D.D.C. 1973).

124. 730 So. 2d 150 (Ala. 1999).

125. *Id.* at 152.

126. *Id.* at 155 ("The conclusion that the contract is ambiguous is fatal to Mann's claim.").

127. *Id.* (Cook, J., dissenting).

Similarly, *Adams v. Kansas City Life Insurance Co.*[128] elucidates how uneasy courts have become about the strict against-the-drafter rule. A life insurance policy "planned" for insureds no longer to pay premiums at age sixty-five.[129] A class of insureds sued after they turned sixty-five, and the insurer did not stop demanding payments. A Missouri district court held that the policy was susceptible to more than one plausible interpretation.[130] However, the court declined to resolve this ambiguity against the insurer. Instead, conflating the "tie-breaking" version of the doctrine with its strict liability manifestation, the court reasoned that "[a]s a general rule, before applying *contra proferentem*, 'recourse must be had to evidence of the relationship of the parties [and] the circumstances surrounding execution of the contract.' "[131] Thus, it held that the need to admit extrinsic evidence made a class action untenable.[132]

Yet, as uncomfortable as courts had become about the strict against-the-drafter rule, they were equally queasy about a theory that let defendants profit from an ambiguity in a contract that they alone had created. Crediting this argument seemed to give defendants the perverse incentive to question the intelligibility of their own agreements. It also raised the specter of moral hazard: as courts split over the validity of express class action waivers,[133] a vague clause could effectively achieve the same result through the back door. In turn, without the class action device, consumers would almost never seek redress for breach of form contracts. But rather than tackling these issues head-on or directly addressing the viability of strict liability *contra proferentem*, some courts rejected defendants' arguments on unconvincing grounds.[134] By inexplicably

128. 192 F.R.D. 274 (W.D. Mo. 2000).

129. *Id.* at 276.

130. *Id.*

131. *Id.* at 281 (quoting Baker v. Whitaker, 887 S.W.2d 664, 670 (Mo. Ct. App. 1994)).

132. *See id.* at 281–82.

133. *Compare* Dale v. Comcast Corp., 498 F.3d 1216, 1124 (11th Cir. 2007) (invalidating class action waiver) *and* Kristian v. Comcast Corp., 446 F.3d 25, 61 (1st Cir. 2006) (same) *and* Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (same) *with* Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 174 (5th Cir. 2004) (upholding class action waiver) *and* Strand v. U.S. Bank Nat'l Ass'n, 693 N.W.2d 918, 926 (N.D. 2005) (same); *and* Spann v. Am. Express Travel Related Servs. Co., 224 S.W.3d 698, 714 (Tenn. Ct. App. 2006) (same).

134. Similarly, other courts grant certification by holding that the existence and "legal implications" of an ambiguity are themselves common issues. Meyer v. Cuna Mut. Group, No. 03-602, 2006 WL 197122, at *17 (W.D. Pa. 2006) ("These

declining to apply strict liability *contra proferentem*, these opinions further marginalized the doctrine.

For example, in *Carder Buick-Olds Co. v. Reynolds & Reynolds, Inc.*,[135] a computer dealer pledged to keep its equipment "in operating condition," including "remedial and preventive maintenance and replacement of parts." When the Y2K bug threatened to make the hardware obsolete, the dealer refused to replace it.[136] An Ohio appellate court rejected both the dealer's assertion of the ambiguity theory and the plaintiffs' claim that strict liability *contra proferentem* applied.[137] In a tortured opinion, the court reasoned that "Y2K problems were not even contemplated when these contracts were drafted and entered into," but nevertheless decided that the language was "general, but not ambiguous."[138] The court failed to explain how the agreements lent themselves to just one plausible interpretation when applied to an unforeseen contingency.

Most recently, in *Schnall v. AT&T Wireless Services, Inc.*,[139] consumers alleged that AT&T breached its wireless terms and conditions by levying an unauthorized service charge. The trial court held that the need for extrinsic evidence caused unique issues to predominate and denied class certification. The Washington Court of Appeals reversed. Citing no authority whatsoever, it dismissed the ambiguity theory based on what can only be described as extra-legal notions of fairness:

> Contrary to AT&T's argument, extrinsic evidence to determine the individual consumer's intent at formation will not be necessary here because these consumers entered into a standardized contract they were not able to negotiate or change on an individual basis. Having availed itself of the benefits of a standardized, boilerplate contract used across the nation, AT&T cannot now assert that the contracts are

issues may well be addressed at the merits stage of the case."); Robin Drug Co. v. Pharmacare Mgmt. Servs., No. 033397, 2004 WL 1088330, at *5 (D. Minn. 2004) ("Any ambiguity in this standardized provision can be interpreted on a class-wide basis."). This approach does not resolve the thorny questions of whether to apply strict liability *contra proferentem* or how to handle individualized extrinsic evidence in an aggregated claim; instead, it temporarily avoids grappling with them.

135. 775 N.E.2d 531, 539 (Ohio Ct. App. 2002).

136. *Id.* at 537.

137. *Id.* at 538.

138. *Id.* at 539.

139. 161 P.3d 395 (Wash. Ct. App. 2007).

> to be interpreted individually based on the intent of each consumer at the time of purchase.[140]

This reluctance to apply the strict against-the-drafter doctrine in the specific niche of class certification has radiated out into the general case law. Even when ruling on the merits—where, of course, judges need not worry about prematurely deciding interpretive issues—some courts have relegated *contra proferentem*, in all its forms, back to its original status as a "tie-breaker."[141] Others, including state supreme courts, have recited the doctrine and yet bizarrely decided not to follow it.[142] In 2005, the Michigan Supreme Court overruled a half-century of its own precedent and concluded that the fact a standard-form contract was offered on a take-it-or-leave it basis "is of no legal relevance."[143]

In sum, the movement away from interpretive formalism has left basic issues relating to the strict against-the-drafter rule unresolved. In states that follow *Pacific Gas and Electric Co.*,[144] there is no consensus about whether extrinsic evidence is admissible to interpret an ambiguous adhesion contract. Likewise, the relationship between strict liability *contra proferentem* and the reasonable expectations doctrine is unclear. Finally, the dilemma caused by whether courts can invoke the strict against-the-drafter doctrine at the class certification

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140. *Id.* at 405.

141. Moore v. Lomas Mortgage USA, 796 F. Supp. 300, 305 (N.D. Ill. 1992) (declining to apply *contra proferentem* to adhesive mortgage agreement because "[i]t is widely held that this principle of construction is one of 'last resort,' properly invoked only 'when other canons of interpretation leave a significant area of doubt' " (quoting Lippo v. Mobil Oil Corp., 776 F.2d 706, 714–15 n.15 (7th Cir. 1985))); Botkin v. Security State Bank, 130 P.3d 92, 100 (Kan. 2006) (construing ambiguity in standard form guaranty against drafter only after considering extrinsic evidence); State Farm Mut. Auto. Ins. Co. v. Esswein, 43 S.W.3d 833, 842 (Mo. Ct. App. 2000) (declining to apply *contra proferentem* because it "should not be applied where the intent of the parties can be ascertained from other sources"); Stephenson v. Oneok Resources Co., 99 P.3d 717, 722 (Okla. Civ. App. 2004) ("If there is an ambiguity in a standard industry form, the trier of fact may look to extrinsic evidence, such as industry custom and usage, to determine the intent of the parties.").

142. For example, in *Seitzinger v. Community Health Network*, 676 N.W.2d 426, 433 (Wis. 2004), the Wisconsin Supreme Court held that the words "legal counsel" in a hospital bylaw did not apply to an attorney who was licensed to practice in New Jersey. The dissent accused the majority of referring to the strict against-the-drafter rule, "fail[ing] to apply it, and proceed[ing] to violate it." *Id.* at 442 (Abrahamson, J., dissenting).

143. Rory v. Continental Ins. Co., 703 N.W.2d 23, 42 (Mich. 2005).

144. *See supra* notes 101–02.

stage has caused some jurisdictions to shy away from the rule. The next Part links this confusion about the doctrine to its lack of a solid conceptual basis.

## II. RATIONALES FOR STRICT LIABILITY *CONTRA PROFERENTEM*

The dominant rationales for strict liability *contra proferentem* each begin with the economic disparity between the parties. According to these justifications, businesses tie products or services to one-sided form agreements, aware that consumers lack the incentive, opportunity, and fiscal muscle to negotiate better terms. From this premise, there are three distinct explanations for the strict against-the-drafter rule. The first hinges on control: because the drafter enjoys total dominion over the contract, it alone should bear the blame for ambiguity. The second centers on the problems inherent with standard-form contracts: giving consumers the benefit of the doubt assuages autonomy and efficiency concerns. The third is a matter of distributive justice: resolving ambiguities against mighty corporations is a step toward achieving the fair distribution of wealth. I discuss each below.

### *A. Control*

The drafter's control over the language is the most popular rationale for strict liability *contra proferentem* in cases,[145] literature,[146] and treatises.[147] Yet these sources rarely elaborate on why authorial hegemony justifies the rule. This is problematic because the bare fact the parties entrusted the drafter to memorialize their intentions cannot explain the strict against-the-drafter rule. Indeed, the same concept—the sheer existence of control—animated the now-discredited practice of interpreting ambiguity in all unilaterally-prepared agreements

145. *See, e.g.*, Intel Corp. v. VIA Techs., Inc., 319 F.3d 1357, 1363 (Fed. Cir. 2003) (applying strict liability *contra proferentem* because "Intel alone drafted the agreement and had complete control over the language of its terms").

146. *See, e.g.*, Abraham, *supra* note 28, at 533 ("[T]he drafter of an ambiguous policy provision should bear responsibility for ambiguity because the drafter has control over the language used in the policy.").

147. *See, e.g.*, 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 at 471–72 (4th ed. 1999) ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.").

against the drafter.[148] In addition, it continues to be the heart of the traditional "last resort" doctrine. Thus, the drafter's control by itself cannot distinguish between *contra proferentem*'s vastly different manifestations. Surprisingly, some courts never look beyond it and conflate these rules.[149] However, the amount of the drafter's control—instead of the mere fact of control—is a better explanation for strict liability *contra proferentem*. From this perspective, *contra proferentem* is a last resort in deals between equals because the non-drafter's ability to negotiate dilutes the drafter's influence. Conversely, *contra proferentem* is dispositive in agreements where the adherent lacks the financial clout to bargain because the drafter enjoys total control.[150] But although this view of the rule has an intuitive appeal, it is hardly perfect. For one, it cannot explain why courts in some states let corporations benefit from the strict against-the-drafter rule in coverage disputes with insurers.[151] Also, it cannot account for the courts that refuse to apply the doctrine if the parties have discussed the meaning of a clause—even if the non-drafter had no meaningful opportunity to persuade the drafter to amend the language.[152]

148. *See supra* text accompanying notes 60–69.

149. For example, in *Pacifico v. Pacifico*, 920 A.2d 73, 78 (N.J. 2007), the New Jersey Supreme Court held that *contra proferentem* did not govern a marital settlement agreement. Without distinguishing between the traditional "tie-breaking" and strict liability doctrines, the supreme court concluded that because the parties had each penned one version of the contract, there was "no singular 'drafter' within the meaning of the doctrine of *contra proferentem*." *Id*. at 79. Although this might be a valid reason to reject strict liability *contra proferentem*, it should be irrelevant for the "last resort" rule.

150. *See, e.g.*, Hamilton v. Stockton Unified Sch. Dist., 54 Cal. Rptr. 463, 467–68 (Ct. App. 1966) (referring to the fact that the non-drafter "lacks the economic strength to secure a change in the language of the document by negotiation"); Doyle v. Fin. America, LLC, 918 A.2d 1266, 1270 n.3 (Md. Ct. Spec. App. 2007) ("An adhesion contract has been defined as one that is drafted unilaterally by the dominant party and then presented on a take-it-or-leave-it basis by the weaker party who has no real opportunity to bargain about its terms." (quoting Meyer v. State Farm Fire & Cas. Co., 582 A.2d 275, 278 (Md. Ct. Spec. App. 1990)) (internal quotation marks omitted)).

151. *See, e.g.*, Morgan Stanley Group, Inc. v. New England Ins. Co., 225 F.3d 270, 279 (2d Cir. 2000) ("[T]here is no general rule in New York denying sophisticated businesses the benefit of *contra proferentem*."); St. Paul Fire & Marine Ins. Co. v. MetPath, Inc., 38 F. Supp. 2d 1087, 1091 (D. Minn. 1998) (rejecting argument that *contra proferentem* "should not apply to the Defendants because they are large, sophisticated companies"); CPS Chem. Co. v. Continental Ins. Co., 536 A.2d 311, 318 (N.J. Super. Ct. App. Div. 1988) ("These principles are no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the ambiguity was caused by language selected by the insurer.").

152. *See, e.g.*, Hamwi v. Citinational-Buckeye Inv. Co., 140 Cal. Rptr. 215, 221 (Ct. App. 1977) (affirming trial court's denial of class certification on claim for

Most importantly, control is not a legitimate justification for strict liability *contra proferentem*. Control may affect when courts apply the rule, but it provides no insight into why the rule is normatively desirable. Sanctioning the drafter for ineffectively exercising its power over the contract resembles a penalty. Like any penalty, however, construing ambiguities strictly against the drafter cannot punish simply for the sake of punishing—it must do so to further a larger purpose. In addition, unlike traditional *contra proferentem*, which, at minimum, enables courts to settle otherwise irresolvable disputes, strict liability *contra proferentem* serves no evident pragmatic function. The traditional doctrine does, however, confer two benefits that are closely tied to the drafter's control: it discourages ambiguity and facilitates the flow of information between the parties. Conceivably, these virtues could also help flesh out a control-based theory of the strict against-the-drafter rule. I examine this possibility in the following subsections.

### 1. Reducing Ambiguity

The proposition that traditional *contra proferentem* encourages careful draftsmanship is as old as the doctrine itself. The unforgiving rule pushes drafters toward transparency or, at least as the Fourth Circuit recently put it, "the most efficient balance between clarity and ambiguity."[153] At first blush, this line of reasoning seems equally fitting for strict liability *contra proferentem*. Placing the onus on the drafter of insurance policies and adhesion contracts makes sense because large institutions are better than individuals and small businesses at pricing "the irreducible component of ambiguity that remains after optimal clarity is achieved."[154]

However, if the intended beneficiaries of unambiguous language are consumers—as this theory assumes—strict liability *contra proferentem* may only marginally affect the way drafters ply their trade. A rational drafter will clarify a contract if doing so costs less than its liability exposure discounted

breach of standardized lease because the disputed paragraph "was individually discussed with substantially all tenants" and thus "interpretation of the paragraph in each individual instance would involve a separate trial of the issue of meaning based upon extrinsic evidence of those discussions").

153. Carolina Care Plan Inc. v. McKenzie, 467 F.3d 383, 390 (4th Cir. 2006).

154. Abraham, *supra* note 28, at 534.

by the probability of an adverse judgment.[155] Thus, a drafter will do nothing unless it can calculate whether a revision will make the court more likely to adopt its view of the language. Few revisions fit this bill under the strict against-the-drafter rule. Normally, a drafter can predict that the court will adopt its reading of a disputed clause if it is better than the other plausible candidates. But under strict liability *contra proferentem*, a drafter enjoys this assurance only if it can foresee that there will be no other plausible candidates. Of course, this will rarely be the case: putting aside the well-documented tendency of judges to conjure ambiguities from thin air,[156] words are notoriously slippery, and no contract can anticipate every future contingency. Drafters may also avoid polishing language to a high shine because doing so exchanges real dollars for savings that may never materialize.[157] Thus, unless firms benefit in some other way from clarity—a point I will revisit—the strict against-the-drafter rule may not significantly deter imprecision.

This is especially true in the insurance context, where courts bemoan the fact that insurers fail to amend language despite decades of unfavorable rulings.[158] To some degree, insurers have no choice: policies are necessarily vague because they must assign risk prospectively, and thus "rely on abstract

155. The drafter would also consider its expected litigation costs and the odds of being sued. Expressed as an equation, if *C* is the cost of revising the agreement, *X* is the drafter's expected litigation costs, *Y* is the drafter's potential liability, *P1* is the probability of a lawsuit, and *P2* is the probability of an adverse judgment, then a drafter will clarify an agreement if $C<P1[X + P2(Y)]$.

156. *See, e.g.*, Keeton, *supra* note 103, at 972 ("The conclusion is inescapable that courts have sometimes invented ambiguity where none existed . . . ."); Llewellyn, *supra* note 76, at 702 ("A court can 'construe' language into patently not meaning what the language is patently trying to say. It can find inconsistency between clauses and throw out the troublesome one."); Rahdert, *supra* note 109, at 330 ("[C]ourts are constantly under pressure to stretch the concept of ambiguity out of shape, sometimes even to manufacture it through sophistry and *tour de force*.").

157. *See, e.g.*, Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1584 (2005) ("An increase in [drafting cost] is a real cost, and it may outweigh the savings in expected litigation costs from the reduction in the probability, and therefore expected cost, of litigation.").

158. *See, e.g.*, New Castle County, DE v. Nat'l Union Fire Ins. Co., 243 F.3d 744, 755 (3d Cir. 2001) ("[I]n spite of this extensive history of litigation, and obvious disagreement amongst courts and parties alike, insurance companies . . . continue to use the phrase without any language defining its scope."); W. Cas. & Sur. Co. v. D & J Enter., Inc., 720 S.W.2d 944, 946 (Mo. 1986) ("This insurance company has perpetuated the language, without substantial change. It took no steps to clear up the confusion which numerous other courts have perceived.").

and general[ ] language, such as 'occurrences,' 'related acts,' 'wear and tear,' and the like."[159] But insurers are also path dependent: a single entity, the Insurance Services Office, creates almost all property and casualty policies.[160] Because the ISO models its standardized forms on a wealth of actuarial data, it provides insurers with risk forecasts that they alone could not generate.[161] The ISO also vets proposed language with state insurance commissioners.[162] As a result, insurers have little incentive to gamble with novel clauses.[163] Instead, as repeat players, they are better-situated to retain confusing ISO-designed terms and simply raise premiums to cover losses from litigation.[164] Ironically, then, the strict against-the-drafter doctrine may be least effective at deterring ambiguity in the very setting that spawned the rule.

Finally, in both the insurance and consumer context, even accepting the premise that strict liability *contra proferentem* promotes clear draftsmanship raises a new question: why should it? Perhaps defining rights and duties in a lucid and inclusive manner makes terms more visible to consumers and thus more likely to be the product of knowing assent. It could also help each party correctly determine whether an exchange will be worthwhile, or help maximize surplus by ensuring that the deal reflects the parties' true wishes. But these virtues depend on an assumption that is likely untrue in the unique milieu of standard forms: that insureds and consumers read the agreement. If, as many commentators believe, a rational customer would not even try to scrutinize the fine print, then en-

159. Schwarcz, *supra* note 33, at 1410.

160. *See* INS. SERVS. OFFICE, INC., ISO: ENHANCING COMPETITION IN THE WORLD'S INSURANCE MARKETS (1997), *reprinted in* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 33–34 (3d ed. 2000).

161. *See* ISO Home Page, http://www.iso.com (last visited Feb. 15, 2008).

162. *See* Boardman, *supra* note 31, at 1113.

163. *See* JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS §2.06[j] (3d ed. 2006) ("Changing the standard form insurance policy is a somewhat arduous process, requiring contributions from legal, claims, actuarial, and other industry personnel, as well as from customers and state insurance regulators."); Schwarcz, *supra* note 33, at 1405 ("Use of these standardized forms is practically a necessity for most insurers because they result in substantial savings on drafting costs, regulatory compliance, and the collection and analysis of actuarial data.").

164. *See* Boardman, *supra* note 31, at 1124 ("The threat of construing language against the insurer is mainly in the surprise; the insurer collected premium X but finds it owes coverage X + Y. The next year the insurer collects premium X + Y, . . . discounting (perhaps) for those policyholders who won't seek Y coverage from X language.").

couraging clarity serves no useful purpose. Even if some buyers read the contract, increasing the degree of intelligibility does not necessarily further autonomy or efficiency goals. Russell Korobkin has shown that adherents decide whether to buy a product based on price and certain "salient" attributes—idiosyncratic preferences such as color.[165] "Non-salient" features—which could run the gamut from color for a color-blind person to the existence of an arbitration clause for most consumers—do not influence the decision.[166] Because buyers are boundedly rational,[167] they will overlook even blatantly one-sided terms if the terms are not salient. Crucially, this myopia makes non-salient terms "invisible" to buyers whether the terms are ambiguous or unambiguous.[168] Thus, even if the strict against-the-drafter rule fosters standard-form contracts that are cleaner and more accessible, it does not guarantee buyers' knowing assent or terms that are fair or efficient.

### 2. Information-Forcing

A second control-centric rationale for traditional *contra proferentem* has emerged from the debate over default rules in contract law. Almost twenty years ago, in a seminal *Yale Law Journal* article, Ian Ayres and Robert Gertner introduced the concept of the "penalty default rule."[169] At the time, scholars assumed that default rules—terms that kick in when a contract is silent—should mirror what the parties would have wanted if they had addressed the issue.[170] Ayres's and Gertner's arresting insight was that some default rules are actually calibrated to impose terms that the parties would not have desired.[171] These penalty default rules exist so that parties will contract

165. *See* Korobkin, *supra* note 10, at 1225 (calling "salient" attributes those that "are evaluated, compared, and implicitly priced as part of the purchase decision").

166. *See id.* at 1226.

167. Bounded rationality refers to the fact that humans cannot acquire and process the full range of information required for optimal decision-making. *See, e.g.*, G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 140–41 (1958).

168. *See* Korobkin, *supra* note 10, at 1247 (noting that "inefficiency can exist even when buyers have actual and specific notice of the content of form terms").

169. *See* Ayres & Gertner, *supra* note 37, at 96–97.

170. *See id.* at 89 (noting that, at the time, "[f]ew academics have gone beyond one-sentence theories stipulating that default terms should be set at what the parties would have wanted").

171. *See id.* at 91.

around them.[172] By supplanting the default with an express term, a party will divulge valuable information to the other party or courts.[173] In a footnote, Ayres and Gertner offered *contra proferentem* as an example of a penalty default, explaining that it induces the drafter to fill contractual gaps and edify the other party.[174]

Although Ayres's and Gertner's hypothesis remains controversial,[175] some courts and academics have called both forms of the against-the-drafter rule a penalty default.[176] This explanation, if persuasive, could be a powerful rejoinder to the accusation that strict liability *contra proferentem* is inefficient. Critics who take this position contend that the doctrine is wasteful because it gives buyers a benefit—for example, broad

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172. *See id*.

173. *See id*. at 97 ("Penalty defaults . . . giv[e] a more informed contracting party incentives to reveal information to a less informed party." (footnote omitted)).

174. *See id*. at 105 n.80 ("The doctrine is not based on the judgment that the parties would have wanted the anti-drafter provision, but that such a penalty encourages drafters to draft more precise contracts."); *see also* Abraham, *supra* note 105, at 1169–70 ("[C]omplete information about market choices may help promote economic efficiency. . . . [and] further[ ] individual autonomy and freedom of contract.").

175. *Compare* Eric Maskin, *On the Rationale for Penalty Default Rules,* 33 FLA. ST. U. L. REV. 557, 557 (2006) (arguing that parties have equally powerful incentives to exchange information without the penalty default) *and* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law,* 33 FLA. ST. U. L. REV. 563, 565 (2006) ("none of the examples they provide in their original or subsequent papers turn out to be a clear penalty default rule") *and* Dennis Patterson, *The Pseudo-Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235, 279 (1993) ("The full effect of the position advocated by Ayres and Gertner is to render utterly superfluous any proposition of law that rests squarely on the language of the parties' agreement.") *with* Ian Ayres, *Yah-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 601–11 (2006) (cataloguing examples of supposed penalty defaults).

176. *See, e.g.*, City of Burlington v. Indem. Ins. Co. of N. Am., 332 F.3d 38, 49 (2d Cir. 2003) ("[T]he expansive reading of 'fortuitous' in all-risk policies could be viewed as a 'penalty default.' . . . [S]uch expansions give insurers, who presumably have better knowledge of insurance laws than do insureds, a powerful incentive to insert explicit language into policies . . . ."); *see also* McAdams v. Mass. Mut. Life Ins. Co., 391 F.3d 287, 300 (1st Cir. 2004) (referring to traditional *contra proferentem* as a "default rule" (quoting Nat'l Tax Inst., Inc. v. Topnotch at Stowe Resort & Spa, 388 F.3d 15, 18 (1st Cir. 2004))); *In re* Liljeberg Enters., Inc., 304 F.3d 410, 443 (5th Cir. 2002) (same); Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 976 (7th Cir. 1991) (noting that strict liability *contra proferentem* "could be recast as . . . requiring the insurer to come forth with information in its possession but unknown to the insured"); Abraham, *supra* note 28, at 545–46 (noting that courts in insurance cases invoke strict liability *contra proferentem* under a "penalty standard" to find coverage "even if most policyholders would not want to pay for such coverage if given the choice").

but pricy insurance coverage—for which they might not have been willing to pay had the drafter expressly included it in the contract.[177] The poster child for this school of thought is *Rusthoven v. Commercial Standard Insurance Co.*, in which the Minnesota Supreme Court interpreted a policy with limits of $25,000 per automobile to provide $1,675,000 for a single accident based on the fortuity that the insured was a truck rental agency with sixty-seven vehicles.[178] Viewing strict liability *contra proferentem* as a penalty default rule explains this seemingly perverse outcome. The doctrine threatens to give buyers a windfall in order to spur drafters to address contingencies in the contract. Although the insurer in *Rusthoven* did not do so, the decision ensured that other drafters would in the future. In turn, this would make more information available to their contracting partners. Likewise, the penalty default concept defuses the charge that strict liability *contra proferentem* reduces the value created by the contract. Again, that is the point: some sellers will fall prey to the rule, but most will displace it; those who take the latter path may actually increase utility.

Nevertheless, the notion that inefficient defaults can maximize gain assumes that the information the drafter discloses to circumvent the rule will be highly beneficial. To be sure, it sometimes is cheaper for parties to state their intentions than it is for courts "to discover that information ex post."[179] But only when the parties omit rudimentary details—such as quantity in an order of goods, which would require a searching inquiry to ascertain—will these savings likely be enough to offset the cost of an inefficient default.[180] Strict liability *contra proferentem* is not so limited. Because it applies even when a court could easily clarify what the parties meant by resorting to extrinsic proof, it cannot be justified on the ba-

177. *See* Abraham, *supra* note 28, at 545 ("[T]he insured is entitled to the coverage . . . even if most policyholders would not want to pay for such coverage if given the choice."); Rappaport, *supra* note 35, at 191 ("[T]he ambiguity rule will sometimes fail to enforce exclusions and other limitations on insurance coverage that the parties, *ex ante*, would have desired."); Schwarcz, *supra* note 33, at 1431 ("Consumers may expect coverage that they would not be willing to pay for if they knew the cost, or, conversely, may fail to expect coverage for which they would be willing to pay.").

178. 387 N.W.2d 642, 642–45 (Minn. 1986).

179. Ayres & Gertner, *supra* note 37, at 97.

180. *See id.* at 97–98 (explaining the U.C.C.'s refusal to enforce a contract that does not specify the quantity of an order on the grounds that "it is cheaper for the parties to establish the quantity term beforehand than for the courts to determine after the fact what the parties would have wanted").

sis that it preserves judicial resources.[181] Information-forcing can also be worthwhile if it enables the recipient of the data to decide whether the agreement reflects the ideal mix of risk and price. Yet here a penalty default theory of the strict against-the-drafter rule suffers from the same flaws as an ambiguity-reduction theory. Because most buyers do not read standard form clauses, and those that do are boundedly rational, greater transparency does not necessarily translate into greater efficiency. Thus, while "penalty (or information-forcing) defaults will at times be efficient,"[182] strict liability *contra proferentem* is not such a doctrine.

Moreover, the rule is not a seamless information-forcing mechanism. For one, although it encourages drafters to fill contractual gaps, it disregards extrinsic evidence. This laser-like textual focus gives drafters no incentive to explain terms to buyers and, in turn, impedes the exchange of information.[183] Also, there is friction between information-forcing and the unique niche of standard-form contracts. Disclosure is often time-consuming and expensive. But standard-form contracts are ubiquitous largely because they abridge the process of mass transacting. In fact, some courts and academics defend enforcing such agreements despite the fact that consumers do not knowingly assent to their terms for the pragmatic reason that they are indispensable to commerce.[184] For instance, in *ProCD, Inc. v. Zeidenberg*[185] and *Hill v. Gateway 2000, Inc.*,[186] the Seventh Circuit upheld a software license and an arbitration clause that appeared inside a sealed package. Judge Easterbrook's reasoning focused on the time-saving virtues of standard forms:

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181. Although the abbreviated interpretive process of strict liability *contra proferentem* consumes fewer judicial resources than a full-fledged examination into extrinsic evidence, it does so only by being agnostic about the parties' actual intent. Thus, like any rule that invites cheap but arbitrary results—for example, if courts decided cases by flipping coins—it saves litigation expenses but creates a high rate of judicial error, which is itself costly.

182. Ayres, *supra* note 175, at 616.

183. *See* Miller, *supra* note 34, at 1863 (noting that the rule "provide[s] insurance companies little incentive to explain or interpret policy provisions to consumers orally").

184. *See, e.g.*, Korobkin, *supra* note 10, at 1205 ("[T]he alternative to form contracts is almost certainly not the resurgence of fully dickered, obligationally complete contracts, but rather law-imposed default terms invoked to fill gaps in the contract the parties negotiate.").

185. 86 F.3d 1447 (7th Cir. 1996).

186. 105 F.3d 1147 (7th Cir. 1997).

> Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.[187]

This logic, with its stress on condensing the contracting process, is starkly at odds with the information-forcing proposition that "a stick to force drafters to educate nondrafters"[188] is advantageous. Thus, whatever the merits of the penalty default theory in general, it is not a completely satisfactory rationale for strict liability *contra proferentem*.

In sum, although courts and scholars commonly attribute the strict against-the-drafter rule to the drafter's control over the agreement, this link dissolves upon inspection. Even if one accepts the dubious conclusions that the rule deters imprecision or facilitates the flow of information, the resulting societal gains are unclear. However, these control-based theories center on the incentives the doctrine creates, rather than what actually happens when courts invoke the doctrine. A viable alternative might consider the gains that result from the rule in action. I analyze two such approaches in the next subsections.

### *B. Corrective Tool*

Even if strict liability *contra proferentem* does not encourage drafters to obtain informed consent or employ optimal terms, its pro-buyer slant could provide ex post benefits. According to this theory, the strict against-the-drafter rule is an interpretive tool that permits courts to rectify the autonomy and efficiency problems in standard-form contracts. Strict liability *contra proferentem* requires judges to consider such contracts from the perspective of a reasonable consumer. If a buyer could plausibly interpret language a certain way, a court must adopt that reading no matter the strength of competing constructions. Arguably, this aligns the meaning of the agreement with what most consumers would have expected if the

187. *Id.* at 1149; *see also ProCD*, 86 F.3d at 1451 ("[T]hat cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.").

188. Ayres, *supra* note 175, at 596.

seller had secured their knowing assent.[189] It may also guide courts away from pro-drafter interpretations that reduce consumers' welfare.[190]

A potential advantage of this theory is that it casts the strict against-the-drafter rule as a sister to the unconscionability doctrine. Courts apply both principles in the same circumstance: when a powerful seller offers a contract on a take-it-or-leave-it basis.[191] In addition, like strict liability *contra proferentem*, the unconscionability doctrine protects liberal-individualistic and instrumentalist values. Courts void contract terms that are grossly unfair.[192] Generally, this correlates with those terms that buyers would not have agreed to if they had read them and those that are uneconomical.[193] The idea that an interpretive canon should apply in the same circumstances and

189. *See, e.g.*, W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 871 (2006) (advocating an approach where "the consumer's reasonable expectations of the transaction [are] the contract, because the [seller] is charged with knowing what they are and has the ability to change them").

190. *See, e.g.*, James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1064–65 (1992) (arguing that when insurers provide inefficient terms, "the pro-insured bias rules reconstruct the contract to create the contract that full disclosure would have achieved"); Rappaport, *supra* note 35, at 193 (contending that strict liability *contra proferentem* is "superior" to the traditional rules of interpretation for harsh terms).

191. The first prong of the test is procedural unconscionability. In many states, this exists if a contract is offered by a stronger party on a take-it-or-leave-it basis. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000). Other states engage in broad, totality-of-the-circumstances inquiries. *See* Scovill v. WSYX/ABC, 425 F.3d 1012, 1017 (6th Cir. 2005) ("Ohio courts look to 'factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, . . . whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible.' " (quoting Cross v. Carnes, 724 N.E.2d 828, 837 (Ohio Ct. App. 1998))).

192. Terms must also be substantively unconscionable: " 'so one-sided as to *shock the conscience*.' " Davis v. O'Melveny & Myers, 485 F.3d 1066, 1075 (9th Cir. 2007) (quoting Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1043 (9th Cir. 2001)) (applying California law); *see also* Hall v. Fruehauf Corp., 346 S.E.2d 582, 583 (Ga. Ct. App. 1986) (defining a substantively unconscionable contract as " 'such an agreement as no sane man not acting under a delusion would make and that no honest man would take advantage of' " (quoting R. L. Kimsey Cotton Co. v. Ferguson, 214 S.E.2d 360, 363 (Ga. 1975))); Adler v. Fred Lind Manor, 103 P.3d 773, 781 (Wash. 2004) (noting that " 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability" (quoting Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995))).

193. *See* Korobkin, *supra* note 10, at 1283 (proposing that courts should void terms that are both non-salient and confer benefits that do not "exceed the value of an alternative term to potential buyers").

serve the same goals seems sound. In fact, strict liability *contra proferentem* should be the less controversial of the two. Because the unconscionability doctrine nullifies express terms, it faces the threshold objection that it invites governmental intrusion into freedom of contract.[194] The strict against-the-drafter rule is comparatively modest: it simply construes the parties' existing agreement.

Yet this view of strict liability *contra proferentem* is flawed in two ways. First, the comparison to the unconscionablity doctrine is misplaced. When a court invokes the unconscionablity rule, it invalidates the offensive language. This is a suitable remedy for a clause that does violence to important values. The strict against-the-drafter doctrine, however, cannot rewrite the contract. Even when it prevents the court from adopting a pro-seller interpretation of a term, the term remains part of the contract. A pro-buyer reading will not necessarily make the term fair or optimal. Thus, because strict liability *contra proferentem* cannot transcend the drafter's blueprint, it safeguards autonomy and efficiency principles less effectively than the unconscionability doctrine. At the same time, it imposes a cost that the unconscionability rule does not. The unconscionability doctrine is narrowly tailored: it does not apply unless a judge determines that a clause is unjust. The strict against-the-drafter rule calls for no such assessment. It sweeps within its ambit every ambiguous clause in every insurance policy and every adhesion contract. As a result, it construes terms in favor of the buyer even when the seller's interpretation accords perfectly with what both parties would have wanted ex post.[195]

Second, the notion that strict liability *contra proferentem* is a corrective tool assumes, of course, that there is a problem to correct. Yet academics have long disputed whether standard

194. *See, e.g.*, Stamm v. Barclays Bank of N.Y., 960 F. Supp. 724, 732 (S.D.N.Y. 1997) (describing "the tension between the principles of freedom of contract and the doctrine of unconscionability"); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 305–06 (1995) (describing applications of the unconscionability doctrine that contravene principles of economic libertarianism).

195. A common refrain among critics of strict liability *contra proferentem* is that it "often will interpret ambiguities to reach inefficient results." Rappaport, *supra* note 35, at 191; *see also* Miller, *supra* note 34, at 1863 ("[T]he parties' more efficient allocation of risk is ignored . . . .").

form agreements are, in fact, deficient.[196] Because sellers attract business by offering terms that buyers value more than the cost of providing them, economists believe that even monopolists will exploit their advantage solely by charging higher prices.[197] A corollary of this point is that, at least from an efficiency standpoint, the content of form contract terms—as opposed to the product they accompany or its cost—should be unobjectionable.[198] As noted, behavioral economists have gone after the weakness in that position by trying to debunk the assumption that buyers possess the psychological ability to value contract terms accurately.[199] Some scholars have argued that deceptive practices cause market failures;[200] others have drawn on agency principles to reach the opposite conclusion.[201] Finally, a budding literature suggests that even if standard-form contracts are suboptimal on paper, they are not suboptimal in practice: sellers may forgive breaches and under-enforce their rights in order to inspire brand loyalty and screen for duplicitous customers.[202] This debate is not likely to end soon.[203] No

196. *See, e.g.*, Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1055 (1977).

197. *See, e.g.*, R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 638 (1996) ("[A] rational monopolist would simply extract monopoly profits directly through price.").

198. *See, e.g.*, Korobkin, *supra* note 10, at 1212 ("By first providing efficient terms and *then* raising price above its competitive-market level, sellers can maximize total profits."); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 843 (2003) ("Even if the seller or creditor has market power, it has the right incentive to supply the terms that parties desire.").

199. *See* Korobkin, *supra* note 10, at 1217–18 ("Efficiency requires not only that buyers be aware of the content of form contracts, but also that they fully incorporate that information into their purchase decisions.").

200. *See* Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511, 1525–28 (2007) (analyzing "shrouding"—" 'product attribute[s] that [are] hidden by a firm, even though the attribute could be nearly costlessly revealed' " (quoting Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 512 (2006))).

201. *See* Gillette, *supra* note 12, at 703 ("[S]ellers' capacity for exploitation is constrained by markets and the capacity of one group of buyers to act as proxies, albeit imperfect ones, for another.").

202. *See* Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 864–80 (2006); *see also* Gillette, *supra* note 12, at 709 (drawing on experimental economics to suggest that "sellers will underenforce terms in [standard form contracts] in an effort to deal fairly with nonreaders"); Rakoff, *supra* note 16, at 1228 ("[B]usinessmen concerned with fostering goodwill do not always stand on a document that was from the beginning overdrafted by lawyers.").

matter which side has the upper hand, a theory of strict liability *contra proferentem* that relies on its worth as a corrective tool will depend on a hotly-contested premise. This cannot inspire confidence in the rule.

### *C. Distributive Justice*

The final potential rationale for strict liability *contra proferentem* claims that because the drafter is in a better financial position than the consumer, resolving ambiguities in favor of the consumer is "a moderate attempt to even the playing field."[204] There is no doubt that distributive concerns—or at least the compulsion to "favor[ ] the underdog"[205]—animate many judicial decisions in this arena.[206] There is also no doubt that some contract rules—such as limits on interest rates, restrictions on landlords, and the minimum wage—shift income and serve broad notions of social justice.[207] In addition, forbidding a party from using its superior monetary resources to gain an advantage in a transaction is arguably similar to the rules against duress and fraud, which forbid a party from exploiting its superior strength or information.[208]

However, legal rules are not well suited to obtain distributive justice. In general, progressive income tax systems and

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203. *Compare* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 750 (2008) ("[C]onsumer mistakes and sellers' strategic response to these mistakes are responsible for a substantial welfare loss . . . ."), *with* Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 810 (2008) ("[T]he introduction of new technologies, especially on the Internet, . . . remains the most powerful way to combat all sorts of consumer misperceptions.").

204. Rappaport, *supra* note 35, at 174; *see also* Zamir, *supra* note 102, at 1724–25 ("[S]ince the drafter is often stronger and wealthier, while the other party is a relatively weak consumer, distributive and proconsumer considerations may also justify the rule.").

205. CORBIN, *supra* note 27, § 24.27, at 306.

206. *See, e.g.*, Charny, *supra* note 32, at 1854 & n.133 (noting that judges often "try to tilt litigation outcomes toward the party whom they perceive to be the adherent to a 'contract of adhesion' ").

207. *See* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 473 (1980) (discussing usury laws, minimum wage laws, and implied warranties of habitability); *see also* Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 381–90 (2006) (discussing landlord self-help and restraints on alienation).

208. *See* Kronman, *supra* note 207, at 495–97. As Kronman argues, wealth is often the reason a party is able to bring greater resources to bear on a transaction. *See id.* at 496 ("Money enables an individual to acquire other transactional advantages (for example, superior information), to withstand pressures that might otherwise force him to make agreements on less favorable terms . . . .").

subsidies are better ways of reallocating wealth from the rich to the poor.[209] Both tax-and-transfer regimes and redistributive legal rules distort incentives to work.[210] But redistributive legal doctrines override the parties' voluntary (and thus wealth-maximizing) decisions. Thus, they are inefficient and create a "double distortion."[211] For example, suppose that strict liability *contra proferentem* effectively takes ten dollars from every corporation and spreads it equally among consumers. It does so only by imposing the additional cost—say, one dollar—of sometimes interpreting contracts in a manner that departs from what the parties would have wanted. The government could help consumers more at the same cost if it abolished strict liability *contra proferentem* and raised taxes to eleven dollars for each corporation.[212] Additionally, unlike taxes and subsidies, which can be keyed to economic status and can systematically shift wealth, redistributive legal rules are haphazard. This is especially true for a doctrine of contractual interpretation. The strict against-the-drafter rule has the potential to benefit an affluent policyholder in a coverage dispute, yet it does nothing for the legions of consumers who are never involved in a lawsuit over an ambiguous standard form agreement. Finally, because corporations can always raise prices to cover the cost of a redistributive legal doctrine, "trying to ad-

209. *See, e.g.*, *id.* at 474 (noting the widespread belief, even among liberals, "that distributional objectives . . . are always better achieved through the tax system than through the detailed regulation of individual transactions").

210. *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 994 (2001) (noting that both redistributive means have "adverse effects on work incentives"); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 668 (1994) ("[T]he distortion is caused by the redistribution itself . . . .").

211. *See* Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 824 (2000) (arguing that redistributive rules cause "insufficient or excessive precaution to avoid accidents"); David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 447 (2003) (arguing that a redistributive rule "will cause individuals to take too much or too little care, breach contracts inappropriately, under- or over-invest in property, and so on"). *But see* Ronen Avraham et al., *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1130 (2004) (arguing that legal rules give individuals the freedom to avoid redistribution either by working less or by modifying their behavior).

212. *But see* Tomer Blumkin & Yoram Margalioth, *On the Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1, 22 (2005) (arguing that this theory neglects the fact that tax-and-transfer systems also impose "significant administrative costs").

just matters *ex post* in favor of the weaker party will just make weaker parties worse off in the long run."[213] Distributive justice is thus not a solid basis for strict liability *contra proferentem*.

### *D. Summary*

In this Part, I have tried to show that the usual explanations given for construing ambiguities in standard-form contracts against the drafter are, at best, incomplete. Control-based theories assert that the strict against-the-drafter rule helps the consumer by encouraging the seller to write clearly and disclose information. Nevertheless, for practical and psychological reasons, consumers likely do not benefit from greater transparency. Corrective tool theories claim that the rule precludes courts from interpreting terms in a way that trammels on autonomy and efficiency values. However, the doctrine is both over-inclusive and ineffective. It applies even when the seller's reading is in harmony with autonomy and efficiency principles. Yet no matter how much a clause violates these tenets, the doctrine must operate within the confines of the seller's language. Distributive justice theories see the rule as a means to transfer wealth from the prosperous seller to the needy consumer. But contractual interpretation pales in comparison to taxes and subsidies as a redistributive mechanism.

Notably, these justifications all focus on the relationship between the drafter, the contents of the standard form, and the consumer. This dynamic is fraught with anomalies: no matter what incentives the law gives the seller, and no matter how much time and attention sellers lavish on the contents of standard forms, buyers will remain rationally ignorant and cognitively biased. As a result, it is unlikely to be the basis of a convincing account of the rule. To defend the doctrine, one must look elsewhere. I do so in the next Part.

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213. IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 993 (7th Cir. 2008); *see also* Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 282 (7th Cir. 1992) ("The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power."). Another likely outcome is that "the drafter will fashion other terms more onerously to compensate for the possible loss of advantage under the potentially ambiguous term." Charny, *supra* note 32, at 1855.

## III. A NEW UNDERSTANDING OF STRICT LIABILITY *CONTRA PROFERENTEM*

Contract language cannot truly be both standardized and ambiguous. The concepts are mutually exclusive: if words possess a single overarching meaning, they do not lend themselves to multiple reasonable interpretations. When ambiguity exists, it destroys the benefits of using uniform language. Standardizing agreements fosters reliability, consistency, and predictability,[214] while the essence of ambiguity is uncertainty. Thus, deterring imprecision in standardized contracts helps maximize gains from standardization itself.

The conventional explanations of strict liability *contra proferentem*, with their focus on helping consumers, fail to consider this larger context. In this Part, I assert that the rule promotes uniformity of meaning in standard-form contracts by offsetting powerful incentives for sellers to use vague language. I also argue that the rule preserves the coherence of contract law: without it, the meaning of mass-produced terms would fluctuate with the particulars of each deal, leading to perverse results. Finally, I suggest two modest doctrinal reforms based on these insights. I argue that courts should have discretion to decline to apply the rule. I also outline two criteria—the nature of the promise and whether the drafter could have easily clarified the language—that courts should consider when making this determination.

### *A. Offsetting Incentives for Ambiguity*

The first purpose of the strict against-the-drafter rule is both simple and familiar: it deters ambiguity.[215] However, contrary to the orthodox understandings of the doctrine, the rule does not do so primarily to help adherents. Instead, it does so because imprecise standard-form contracts are deleterious both for drafters and social utility.

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214. *See, e.g.*, Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 287–88 (1985) (describing similar benefits in state-supplied default terms); Henry T. Greely, *Contracts as Commodities: The Influence of Secondary Purchasers on the Form of Contracts*, 42 VAND. L. REV. 133, 138–42 (1989) (describing the benefits of standardized contract terms for "secondary purchasers," such as oil and gas lessors and companies that sell residential mortgages).

215. *See supra* notes 153–54.

Of course, the ability to offer standardized contracts saves firms the significant expense of negotiating and drafting individualized agreements.[216] Moreover, standard form agreements reduce institutional and agency costs. When language has a fixed meaning, corporations can more plainly foresee their profits, losses, and liabilities. They can also make informed calculations about the effects of reserving specific rights and accepting specific duties.[217] In addition, the standard form serves a communicative function: it conveys executive decisions to every level of the corporate hierarchy and ensures that members of an entity speak with one voice.[218] By circumscribing discretion, homogeneity reduces the risk of underlings furthering their own interests.[219] Finally, by sparing companies the staggering cost of having to examine each transaction and tailor each performance, standard forms "promote efficiency within a complex organizational structure"[220] and "infinitely simplify the task of internal administration."[221] Buyers pay a price that reflects these savings. Accordingly, both parties benefit from standardization.

Yet these virtues depend on standardized terms possessing a single, shared, ascertainable meaning. Of course, firms are not monolithic; they are comprised of numerous independent-minded individuals. Standard contract language that lends itself to multiple reasonable readings not only deprives a company of the benefits of uniformity; it has the potential to wreak

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216. *See, e.g.*, Llewellyn, *supra* note 76, at 701 ("They save trouble in bargaining. They save time in bargaining.").

217. *See, e.g.*, W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 24 (1984) ("Standard forms also enable a business to make its risks of transacting more manageable by making them uniform for all its transactions of a kind.").

218. *See* Rakoff, *supra* note 16, at 1222 (noting that standard forms "facilitate [ ] coordination among departments").

219. *See* Llewellyn, *supra* note 76, at 701 ("[Form contracts] ease administration by concentrating the need for discretion and decision in such personnel as can be trusted. . . . "); Rakoff, *supra* note 16, at 1223 ("[F]orm contracts serve[ ] as an automatic check on the consequences of the acts of wayward sales personnel."); Steven R. Salbu, *Evolving Contract as a Device for Flexibility and Control*, 34 AM. BUS. L.J. 329, 378 (1997) ("[S]tandardization of contractual provisions can reduce agency costs by limiting opportunities for agents to exercise discretion in their own interests."). However, this perspective appears to be at odds with the proposition that firms give their agents discretion to forgive standard form breaches "because they have an interest in building and maintaining cooperative, value-enhancing relationships with their customers." *See* Johnston, *supra* note 202, at 858.

220. Rakoff, *supra* note 16, at 1222.

221. Llewellyn, *supra* note 76, at 701.

havoc. Internal cooperation and coordination are the lifeblood of an organization.[222] For example, recall the class actions against Ford for breaching a promise to install an "upgraded radiator" in its pickups.[223] A Ford employee could have interpreted that phrase to mandate a radiator that met certain specifications. Indeed, that was the reading the company urged the courts to adopt.[224] Conversely, a Ford employee could have read those words as the plaintiffs allegedly did: to require a particular radiator.[225] Thus, an executive might order either thousands of new radiators or none based on her construction of the clause. There is no guarantee that this same view was shared by the person who set the sticker price, the person who created financial models for pickup sales, or the person who determined whether to include an arbitration clause in the agreement. Admittedly, it is possible that Ford made its wishes clear to its staff through means other than the contract, such as an internal memorandum. But this is unlikely to be true: given the ease with which Ford could have expressed this intent in the contract, it seems more plausible that genuine confusion exists. The result is not just inefficient; it is a kind of institutional schizophrenia.

Ambiguity also increases agency costs. When internal standards are unclear, a firm lacks a yardstick by which to gauge employee performance.[226] Agents may seize this opening

222. Indeed, "scholars in the field of management have emphasized the critical importance of cooperation and coordination for the achievement of objectives." Ken G. Smith, Stephen J. Carroll & Susan J. Ashford, *Intra- and Interorganizational Cooperation: Toward a Research Agenda*, 38 ACAD. MGMT. J. 7, 8 (1995); *see also* RICHARD W. ENGLAND, EVOLUTIONARY CONCEPTS IN CONTEMPORARY ECONOMICS 167 (1994) (noting that firms require "a collection or organizational facts, codes, and languages, whose meaning is clear to all members"). The absence of clear imperatives impairs decision-making and breeds employee dissatisfaction. *See* Hillel J. Einhorn & Robin M. Hogarth, *Decision Making Under Ambiguity*, 59 J. BUS. S225, S229 (1986) (noting additional complications for decision-making "when evidence is unreliable and conflicting"); Florian Menz, *'Who Am I Gonna Do This With?': Self-Organization, Ambiguity and Decision-Making in a Business Enterprise*, 10 DISCOURSE & SOC. 101, 123 (1999) (explaining that ambiguity "is usually more strainful and more labor-intensive than running through unambiguous standardized procedures and actions").

223. *See supra* text accompanying note 1.

224. *See* Zeno v. Ford Motor Co., 238 F.R.D. 173, 178 (W.D. Pa. 2006) ("Ford maintained that even without the upgraded radiator, 'the cooling system in 2000 and 2001 F-150 vehicles fully meets and exceeds Ford's Super-Duty Engine Cooling specifications.' ").

225. *See id.* at 177.

226. *See, e.g.*, William G. Ouchi, *Markets, Bureaucracies, and Clans*, *in* FIRMS, ORGANIZATIONS AND CONTRACTS: A READER IN INDUSTRIAL ORGANIZATION 442,

to act in a self-serving fashion. Well-meaning employees may engage in conduct that they believe is acceptable but which the company intended to prohibit. Different factions within the corporation may develop vested interests in their "pet" reading of imprecise language.[227] For instance, Ford's marketing and sales departments would gain more from interpreting "upgraded radiator" in the manner that customers would prefer; other divisions would profit from cheaper constructions. Thus, by deterring imprecision, strict liability *contra proferentem* helps firms avoid these pitfalls.

With so much to lose from ambiguity, it would seem that companies would gravitate toward clarity even without the strict against-the-drafter rule. However, as I explain in the next subsections, corporations have formidable competing incentives both to "fuzz up" standard-form contracts and retain suboptimal language even if it proves costly. Strict liability *contra proferentem* counterbalances these enticements.

### 1. Opportunistic Ambiguity

Because standard forms are not negotiated and often go unread, they are not subject to the same scrutiny as bargained-for exchanges. As a result, they invite opportunism. The strict against-the-drafter rule makes firms less likely to take the bait.

In other contexts, commentators have noted that drafters may insert strategic gaps—even if doing so diminishes the parties' net gain—in order "to get a larger piece of the smaller contractual pie."[228] Anecdotal evidence suggests that some form drafters inexplicably fail to define their own duties. Consider the recent class action brought by Yellow Pages advertisers against Pacific Bell for allegedly failing to distribute its direc-

448–49 (Peter J. Buckley & Jonathan Michie eds., 1996) (noting in such cases "it becomes impossible to evaluate externally the value added by any individual").

227. *See, e.g.*, Wenpin Tsai, *Social Structure of "Coopetition" Within a Multiunit Organization: Coordination, Competition, and Intraorganizational Knowledge Sharing*, 13 ORG. SCI. 179, 180 (2002) (discussing the phenomenon of "coopetition": units inside a firm that both collaborate and compete).

228. Ayres & Gertner, *supra* note 37, at 127; *see also* Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 KY. L.J. 43, 50 (2008) (discussing *contra proferentem* and the goal of deterring opportunism, but not expressly linking the two concepts).

tories as promised.[229] Pacific Bell's boilerplate agreement required it to deliver Yellow Pages to "its business and residential telephone customers."[230] This language, which does not specify whether Pacific Bell must supply Yellow Pages to all, some, or a percentage of its customers, is patently ambiguous. Why would a company with boundless legal resources fail to cure so glaring an omission?

There are two possible answers to that question. First, as explained above,[231] drafters can use ambiguity to shield themselves from class actions. Indeed, when the advertisers moved for certification, Pacific Bell argued that individualized extrinsic evidence was necessary to resolve the vague terms.[232] Tactical ambiguity can be especially useful for harsh terms, which firms have ulterior reasons to obscure, and which are more likely to generate litigation. For example, financial institutions earn "millions of dollars" of extra annual revenue because they charge loan interest rates based on a 360-day "year."[233] Traditional contract theory, which provides that it will be efficient for parties to include express terms in a contract when it can be done inexpensively and when the performance of those terms can be verified,[234] suggests that banks would disclose this technique in their loan documents. But most loans only contain a cryptic reference to interest accruing "per annum." This may be suboptimal, but it has enabled banks to ward off class actions by convincing courts that "per annum" is ambiguous.[235] If these courts had instead applied strict liability *contra proferentem*, they might have put an end to this practice.

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229. *See* First Amended Complaint at 1, Ammari Elecs. v. Pac. Bell Directory, No. RG05198014 (Cal. Super. Ct. filed Apr. 22, 2005). In the interests of disclosure, I performed some contract work for the plaintiffs in *Ammari*.

230. *See id.* Ex. A, at 4, ¶5.

231. *See supra* Part I.D.

232. *See* Defendant's Memorandum of Points of Authority in Opposition to Plaintiff's Motion for Class Certification at 1–2, Ammari Elecs. v. Pac. Bell Directory, No. RG05198014 (Cal. Super. Ct. filed July 31, 2007).

233. *See* Allan W. Vestal, *No Longer Bending to the Purposes of the Money Lenders: Prohibiting the "Bank Method" of Interest Calculation*, 70 N.C. L. REV. 243, 243 (1991).

234. *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1660 (2003) ("[T]he assumptions of contract theory [are] that parties will not contract over nonverifiable terms but will contract over verifiable terms that can be specified at low cost."). *But see* B. Douglas Bernhein & Michael D. Whinston, *Incomplete Contracts and Strategic Ambiguity*, 88 AM. ECON. REV. 902, 903 (1998) (challenging this assumption).

235. *See, e.g.*, Fletcher v. Sec. Pac. Nat'l Bank, 591 P.2d 51, 55 (Cal. 1979); First Am. Nat'l Bank of Nashville v. Hunter, 581 S.W.2d 655, 659 (Tenn. Ct. App. 1978).

Second, by using open-ended terms, firms give themselves flexibility. This is particularly true where, as with the Pacific Bell case, the clause details the essence of the drafter's obligations. By hedging about what it intends to do, a drafter can acquire data about its contractual partners, while reserving the power to alter the scope of its own performance.[236] For instance, Pacific Bell might decide to deliver Yellow Pages to all its telephone customers if it seems to have attracted high-end advertisers who could be valuable clients. Conversely, it may choose a less-onerous obligation if fewer advertisers sign up or if a high percentage of those that do sign up have difficulty making payments. Also, ambiguity gives firms room to claim that substandard performance is not a breach. Pacific Bell may well have intended to distribute Yellow Pages to each of its telephone customers, but by avoiding that level of specificity in the agreement it can plausibly assert a contrary position if a dispute arises. At the same time, this level of abstraction will hurt the company by sowing internal confusion and depriving it of the value created by standardization. Strictly interpreting terms against the drafter checks this damaging tendency for deliberate imprecision.[237]

### 2. Network Benefits and Switching Costs

The strict against-the-drafter rule also remedies the fact that, if left to their own devices, firms will "cling for decades" to flawed contract terms.[238] Even if an ambiguity in a boilerplate agreement throws a company's internal procedures into disarray, the company may be reluctant to alter the contract. This is because standardized language possesses an intrinsic value that flows from the mere fact that it is standardized.

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236. In a related argument from the opposite perspective, Jason Scott Johnston suggests that companies screen customers by adopting harsh standard form terms but permitting their employees to ignore them. *See* Johnston, *supra* note 202, at 858. For example, a bank manager may enforce a penalty only when a borrower offers no excuse for a late payment on the theory that the borrower has identified himself as a credit risk. *See id.* at 878–79. As noted, Johnston's claim seems to be at odds with the claim that firms use standard forms to reduce employee discretion and the agency costs of monitoring and evaluation. *See supra* text accompanying note 219.

237. Also, because deliberately using ambiguity to gain an advantage is morally problematic, deterring the practice may confer non-quantifiable benefits as well.

238. Boardman, *supra* note 31, at 1106.

For one, standard terms create "network benefits"—the phenomenon that products become more valuable as their use becomes more common.[239] A telephone, for example, is worthless unless other people own telephones; now that major movie studios have decided to abandon HD-DVD, Blu-ray players are in higher demand.[240] Likewise, contract terms increase in value when other firms also adopt them. Courts are more likely to interpret or adjudicate issues relating to widespread contract language. In turn, judicial decisions promote certainty of meaning, which helps companies make better decisions about risk and profit.[241] Also, other business professionals will be accustomed to commonly-used terms and therefore be able to provide higher-quality services at a lower cost.[242] Thus, if a clause is widely-shared, firms will resist abandoning it.

Moreover, amending a standardized term forces businesses to incur "switching costs."[243] Routines become embedded over time; switching costs result from the disruptive nature of changing them. Assume that Pacific Bell customarily delivers Yellow Pages to the majority of its telephone customers. If it decides to deliver Yellow Pages to all of its telephone customers, it must raise its prices, order more directories from its supplier, expand its delivery capacity, convey this information to employees, and expend more resources supervising them.

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239. *See* Michael Klausner, *Corporate Law and Networks of Contracts*, 81 VA. L. REV. 757, 762 (1995) ("Common use of a corporate contract term, in itself, can thus provide value."); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 483 (1998) ("[N]etwork effect exists where purchasers find a good more valuable as additional purchasers buy the same good.").

240. *See, e.g.,* Miguel Bustillo, *Retailers Slash Blu-Ray Player Prices*, WALL ST. J., Oct. 28, 2008, *available at* http://online.wsj.com/article/SB122514674049473763.html?mod=googlenews_wsj.

241. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 722 (1997) ("Judicial opinions can reduce uncertainty regarding the validity and meaning of a term and the interaction of the term with relevant legal requirements, such as those contained in corporate, securities, and bankruptcy laws.").

242. *See* Claire A. Hill, *Why Contracts are Written in "Legalese,"* 77 CHI.-KENT L. REV. 59, 70 (2001) ("Once a lawyer invests in learning how to use the process and understanding the terms and structure of typical contracts, the incremental cost for each subsequent use of the process will be small, and the process will provide the cheapest and quickest way to produce a contract."); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1594–95 (1998) ("Widespread use of a contract term can also create benefits for users by making lawyers and other providers of legal services more facile in drafting, negotiating, interpreting, and, if need be, litigating the term." (footnote omitted)).

243. *See* Kahan & Klausner, *supra* note 241, at 727.

All of this is expensive. Therefore, even when the status quo is suboptimal, Pacific Bell, like all firms, may prefer to maintain it.

In sum, corporations cannot reap the full benefits of standardization unless their form contracts sound with a single meaning. At the same time, they have reasons to be deliberately imprecise and retain troublesome terms. By construing ambiguity against the drafter, strict liability *contra proferentem* deters these practices. In fact, the rule does more than provide these ex ante incentives. As I discuss below, it plays an important functional role as well.

### *B. Preserving the Coherence of Contract Law*

Irrespective of whether it discourages ambiguity, the strict against-the-drafter rule serves a function that is vital to the health of contract law: it ensures that standardized terms cannot have more than one legal meaning. When a court invokes the doctrine, it not only determines the significance of a disputed term in a particular contract, but it determines the significance of a disputed term in thousands of contracts. The rule therefore prevents the meaning of mass-produced language from fluctuating with the particulars of each transaction.[244]

This is important for both practical and theoretical reasons. When Ford makes half a million promises to include an "upgraded radiator," it has two choices. First, it can customize the type of radiator it installs based on extra-contractual factors, such as what a salesman says or a buyer requests. But this kind of tailored performance defeats the purpose of standardization. It involves all the expense and hassle of a traditional bargained-for exchange.

What makes more sense is for Ford to try to fulfill its duty through one, all-inclusive course of performance: mounting the same radiator in every truck. But if Ford picks this option, and the meaning of "upgraded radiator" varies from deal to deal,

244. In this way, the strict against-the-drafter rule recognizes that standard form contracts may have more in common with statutes than with traditional contracts. *See, e.g.*, Boardman, *supra* note 31, at 1111 (comparing standard form contracts to "broad statutes"); Slawson, *supra* note 10, at 530 (comparing the lawmaking capacity of a standard form drafter with that of courts and legislatures). Of course, no one would argue that the plain language of a statue could mean different things to different individuals.

Ford will be unable to honor its promise to many buyers.[245] Consumers for whom "upgraded radiator" means a 1.02 inch model will receive a 1.02 inch model, but so will consumers for whom "upgraded radiator" means a heavy-duty 1.42 inch model. The only way for Ford to avoid widespread breach is to install the radiator that most consumers would prefer: the 1.42 inch model. Whether or not Ford does so, the strict against-the-drafter rule will read that obligation into the contract by giving "upgraded radiator" the meaning most favorable to the buyer.

If the doctrine did not exist to serve this function, the consequences would be absurd. Even though Ford will have installed the same radiator in all its trucks, it could offer extrinsic evidence that "upgraded radiator" means different things to different consumers. To accept that claim—to find that Ford provided 1.02 inch radiators to all buyers but promised some buyers that it would install 1.02 inch radiators and others that it would install 1.42 inch radiators—is to find that Ford made promises that it had no intention of keeping. Accordingly, Ford's assertion, distilled to its essence, would be that it did not breach a contract, but merely committed fraud.[246]

The Pacific Bell case provides a sharper illustration of this paradox. When Pacific Bell promises to distribute Yellow Pages to "its business and residential telephone customers," it must effectuate its obligation through a single, generally-applicable course of performance. Unlike Ford, Pacific Bell does not even have the option of customizing: it cannot accommodate its clients' divergent understandings by simultaneously delivering Yellow Pages to "all" and "most" and "ninety percent" of its telephone customers. It has no choice but to supply Yellow Pages to a fixed percentage of its customers. This may be one-hundred percent or it may be eighty percent. But it cannot be a certain percentage for some clients and another percentage for other clients—the percentage will be the same for all clients. As a matter of logic, Pacific Bell's promise cannot mean different things to different clients. Yet under traditional principles of contractual interpretation, a court could reach that very conclusion. The strict against-the-drafter rule,

245. Seanna Shiffrin deserves credit for this point.

246. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 530(1) (1965) ("A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention.").

which ensures that uniform language has a uniform meaning, precludes that result.[247]

### *C. Doctrinal Implications*

This discussion reveals that, contrary to the prevailing wisdom, strict liability *contra proferentem* is defensible. In some situations, it is even essential. Like all rules, though, its doctrinal content should mirror its normative core. The traditional conception of the rule as an inflexible mandate that extends to all insurance policies and adhesion contracts is harder to defend and likely accounts for some of the recent backlash. With two related changes, courts could limit the doctrine in a manner consistent with my analysis.

First, the rule should be a rebuttable presumption rather than a bright-line reflex. This adjustment reflects the fact that the doctrine makes more sense in some contexts than others. For example, achieving singularity of meaning is especially important when the standard terms at issue describe a firm's performance duties. Imprecision will cause the most mischief when it appears in a clause that tells individual members of an entity what to do.[248] Similarly, drafters have greater incentives to use ambiguity opportunistically in language that details their obligations.[249] Finally, because companies often must fulfill standardized promises through a single all-inclusive performance, it would be perverse if those terms did not also possess uniform meaning.[250] However, other aspects of the contract—for instance, "end game" devices such as arbitration clauses[251]—do not pose the same risks. It is difficult to

247. One possible source of authority for the proposition that courts should give all standard form terms a single interpretation is the RESTATEMENT (SECOND) OF CONTRACTS, section 211(2) (1981), which provides that standard form terms should be "interpreted wherever reasonable as treating alike all those similarly situated." Yet the Restatement provides no elaboration on why this should be so. As a result, courts have cited section 211(2) just nine times in the thirty years since its enactment—and two of those decisions rejected it. *See* Wechsler v. Long Island Rehabilitation Ctr. of Nassau, Inc., No. CIV. A. 93-6946-B, 1996 WL 590679, at *19 (Mass. Super. Ct., Sept. 4, 1996) (laying out factual reasons for not applying section 211(2)); Stephenson v. Oneok Res. Co., 99 P.3d 717, 722 (Okla. Civ. App. 2004) (stating that section 211(2) cannot legally override the intent of the parties).

248. *See supra*, text accompanying notes 215–227.

249. *See supra*, text accompanying notes 228–229.

250. *See supra*, text accompanying notes 243–246.

251. Johnston, *supra* note 202, at 858 (describing "breakdown" and "endgame" terms that relate to dispute resolution (citing Lisa Bernstein, *Private Commercial*

envision the harm that could result from a company's employees harboring different views about the significance of esoteric legal terms.[252] Thus, judges should have the freedom to find that invoking strict liability *contra proferentem* would not serve its animating purposes.

Second, drafters should be able to rebut the presumption by proving that they could not have easily clarified the ambiguous language.[253] Many of the evils that the strict against-the-drafter rule remedies are correlated with terms that are perfectible. Ford could have specified the radiator it intended to install, and Pacific Bell could have stated how many customers it intended to reach. These puzzling omissions may be evidence of strategic ambiguity. Even if they are accidental, they are costly,[254] and the law should deter them. Likewise, imprecision that could have been corrected may indicate an inertia caused by a corporation succumbing to network effects or switching costs. But these concerns are less forceful when it comes to terms that defendants could not have easily improved. Recall *Carder Buick-Olds Co. v. Reynolds*,[255] which dealt with whether a promise to repair computers required a firm to replace hardware ruined by the Y2K bug. Because the transac-

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*Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. REV. 1724 (2001) for the "endgame" inspiration and terminology)).

252. Courts generally construe ambiguities in arbitration clauses strictly against the drafter. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) (rejecting claim that clause eliminated arbitrator's right to award punitive damages—an issue on which it was silent—because *contra proferentem* "protect[s] the party who did not choose the language from an unintended or unfair result"). However, the Federal Arbitration Act's powerful pro-arbitration policy leads courts to decline to apply strict liability *contra proferentem* when the meaning of the contested language resolves the threshold issue of whether the parties agreed to arbitrate at all. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 35–36 (1st Cir. 2006) ("Where the federal policy favoring arbitration is in tension with the tenet of *contra proferentem* for adhesion contracts, and there is a scope question at issue, the federal policy favoring arbitration trumps the state contract law tenet.").

253. For similar suggestions in the insurance context, see Abraham, *supra* note 28, at 541–42, which notes that some insurance cases seem to apply a "perfectibility" standard and decline to apply the doctrine if it is not "feasible to perfect the policy language sufficiently to eliminate the ambiguity," and Schwarcz, *supra* note 33, at 1454–55, which proposes that courts adopt a doctrine for insurance policies that, like products liability, requires the insured to prove that "(1) the insurance harm was foreseeable ex ante, and (2) could have been avoided by reasonable alternative language."

254. *See supra*, text accompanying notes 222–226.

255. *See supra*, text accompanying notes 135–138.

tion occurred long before the glitch was even discovered,[256] strictly construing the contract against the defendant would neither discourage opportunism, nor punish the defendant for an inadvertent mistake, nor force a recalcitrant corporation to break free of the status quo. If a firm shows that it could not have rectified an imprecision, applying the strict against-the-drafter rule will not further the rule's purposes. In these circumstances, courts should decline to apply the rule.[257]

A rebuttable presumption would also provide a workable solution to the class action dilemma. As noted above, when a defendant opposes class certification on the grounds that its own standardized contract is ambiguous, the court faces a difficult choice.[258] On one hand, accepting this theory creates a risk of moral hazard and rewards a firm for its own shoddy draftsmanship. On the other hand, because the strict against-the-drafter doctrine definitively establishes the meaning of the contract, invoking it violates the prohibition on resolving the merits at the certification stage. Courts could balance these concerns if the doctrine presumptively applied but also contained exceptions—the "type of promise" and "perfectibility" standards mentioned above—that were fact-intensive and thus not resolvable at the certification stage. If the court eventually decided not to invoke the doctrine, it could decertify the class. In addition, these exceptions would not apply to easily clarified terms of performance—the most likely candidates for strategic ambiguity. Thus, the strict against-the-drafter rule would preclude defendants from employing ambiguity—either by design or mistake—to obtain back door class action waivers.

## CONCLUSION

Standard-form contracts are a defining feature of modern commerce. For over a century, courts have strictly resolved ambiguities in such contracts against the drafter. However, the doctrinal scope and normative basis of this rule have long been obscure. It emerged with the insurance industry and first

256. *See* Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc., 775 N.E.2d 531, 539 (Ohio Ct. App. 2002).

257. At the same time, however, there may be no relevant extrinsic evidence to illuminate the meaning of a clause when applied to an unforeseen contingency. If this is the case, there may be no meaningful difference between strict liability *contra proferentem* and the traditional "tie-breaking" version of the rule both will eventually resolve the ambiguity against the drafter.

258. *See supra*, text accompanying notes 119–143.

applied on the grounds that one party—no matter their wealth or status—had drafted an agreement without input from the other. With the ascent of mass production, courts recast the doctrine as a counterpoint to the drafter's control over mass-produced contract terms. In recent decades, however, the shift away from formalism in contractual interpretation has undermined the rule. In addition, because the doctrine often arises at the certification stage in a class action for breach of an allegedly ambiguous standard-form contract—a situation that gives courts a Hobson's choice between prematurely deciding the merits of the case and letting corporate defendants use their own sloppy draftsmanship to avoid liability—courts are unclear about whether, when, and why to apply it. In fact, the three conventional justifications for the rule share a fundamental flaw: they cannot explain why contract law should try to improve terms that consumers ignore and cannot rationally appraise.

In this Article, I have contended that strict liability *contra proferentem* makes sense if conceptualized as fostering uniformity of meaning in uniform contracts. By neutralizing incentives for firms to use ambiguity tactically and to retain imprecise terms, the rule maximizes the value from standardization. In addition, it precludes courts from reaching the nonsensical conclusion that the meaning of a standardized promise can vary even when the promisor either will not or cannot fulfill its duty in the same way for each promisee. These salutary purposes counsel against abandoning the rule at a time when we need it most.